

12
5

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 255.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN
ERROR,

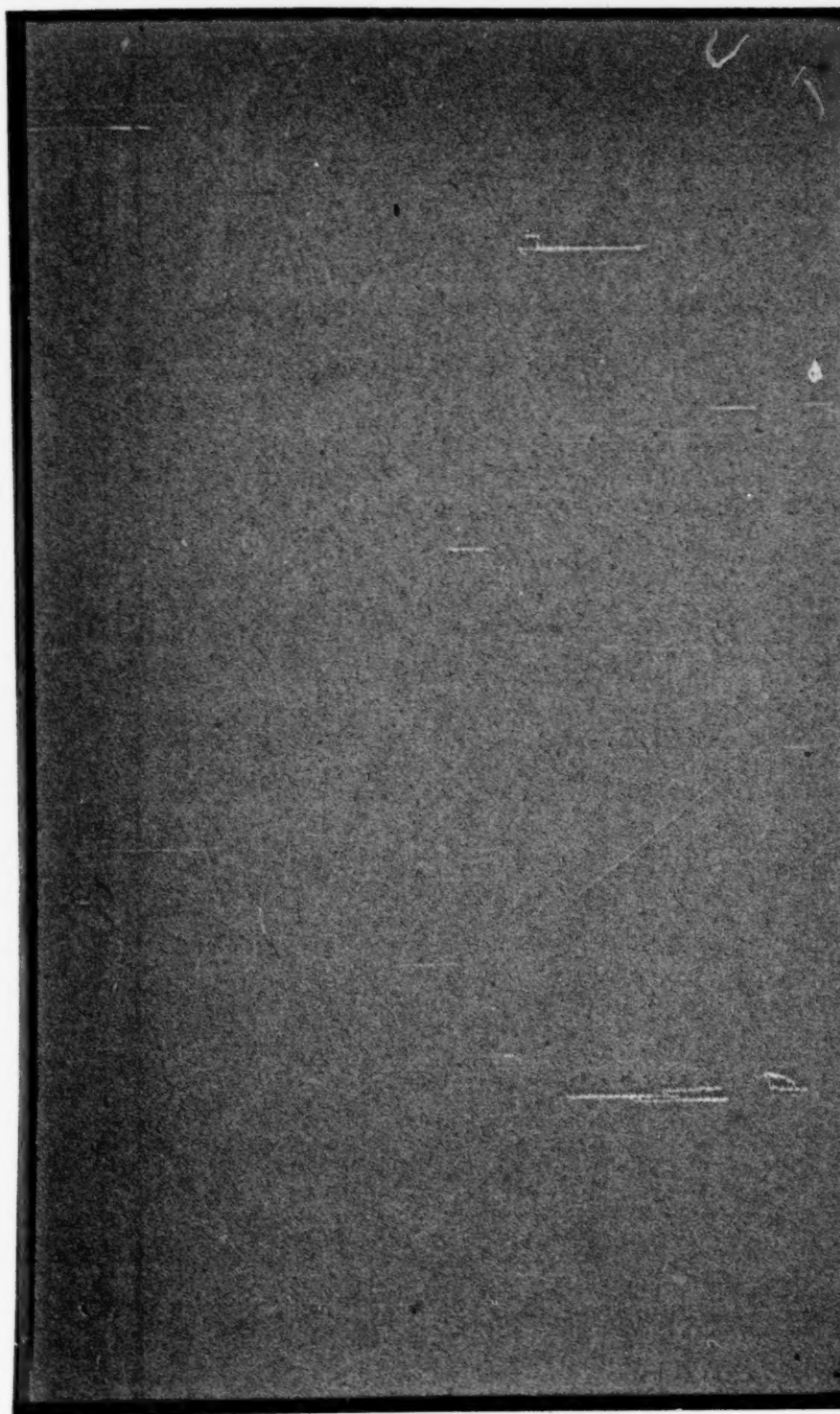
vs.

RICHARD G. HEAD, JR., BY HIS NEXT FRIEND, B. F.
DEATHERAGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MAY 11, 1913.

(23,206)



(23,206)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 255.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN
ERROR,

vs.

RICHARD G. HEAD, JR., BY HIS NEXT FRIEND, B. F.
DEATHERAGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print
Writ of error.....	1	1
Order allowing writ of error.....	2	1
Caption	3	2
Certified copy of judgment and order granting appeal.....	3	2
Abstract of record.....	6	4
Petition	7	4
Answer	14	8
Exhibit A—Policy loan agreement.....	24	16
Reply	26	17
Record entries.....	26	17
Bill of exceptions.....	28	18
Testimony of B. Magill.....	28	18
Policy No. 599,691.....	33	22
Application	39	27
Deposition of Edward A. Anderson.....	46	32
Testimony of Edward A. Anderson.....	48	33
Exhibit A—(Not set out).....	53	37
B—Note of Richard G. Head, April 3, 1905.	53	37

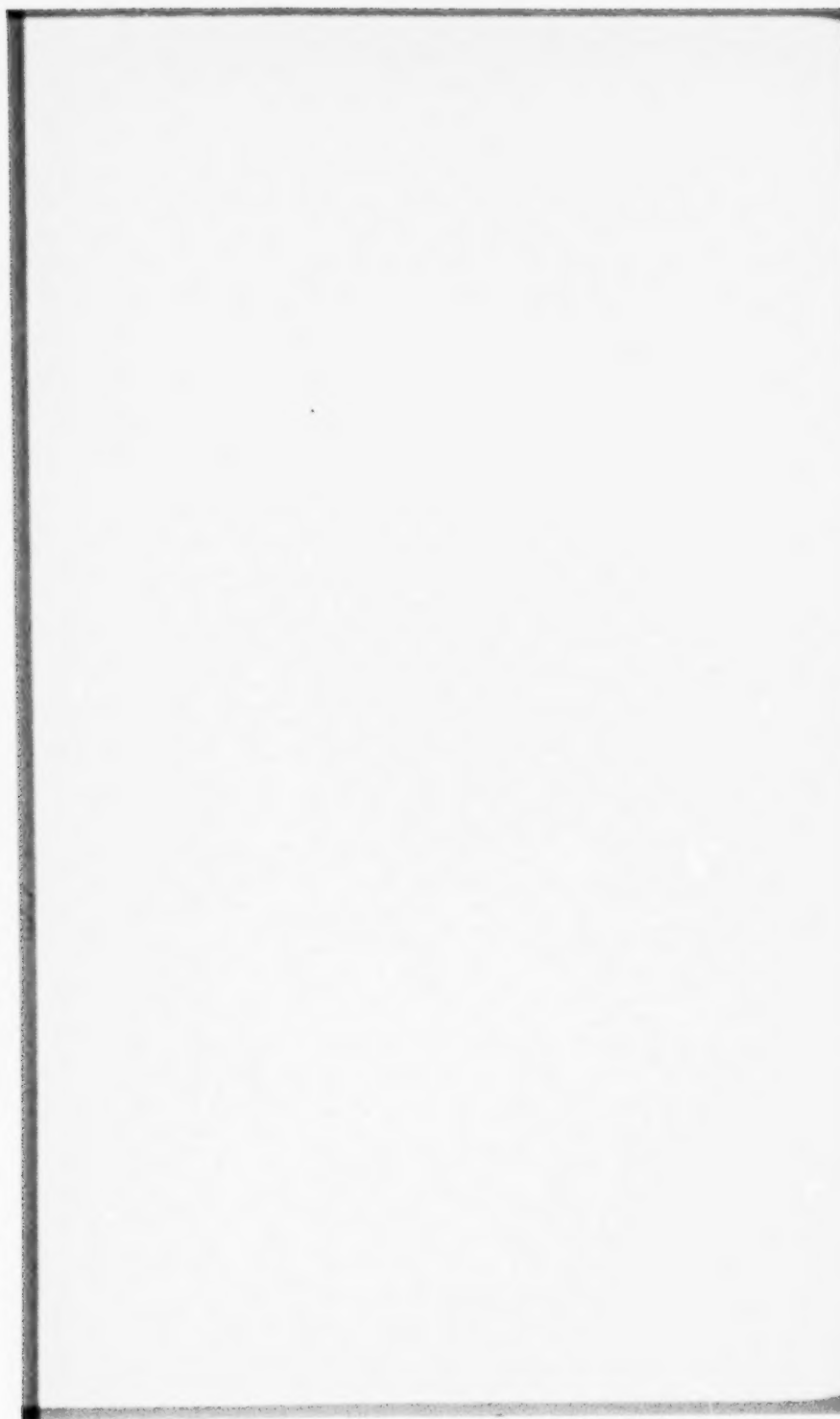
	Original. Print	
Testimony of B. F. Deatherage.....	54	38
Letter of April 23, 1906.....	55	38
Letter of July 7, 1906.....	56	39
Letter of July 14, 1906.....	57	40
Receipt of July 21, 1906.....	58	41
Letter of July 23, 1906.....	59	41
Letter of May 20, 1899.....	61	42
Letter of July 29, 1904.....	62	43
Petition for appointment of next friend.....	63	44
Order appointing next friend.....	64	45
Testimony of Mary E. Head.....	64	45
Letter of April 18, 1906.....	67	47
Receipt of May 4, 1905.....	68	48
Testimony of Joseph B. Reynolds.....	69	49
James H. McIntosh.....	73	52
Exhibit A—Certificate of Secretary of State of New York.....	76	54
B—Section 88, surrender value of lapsed or forfeited policies.....	76	54
Testimony of Arthur R. Grow.....	78	55
Benjamin T. Wilcox.....	80	57
Exhibit A—Record of changes.....	82	59
Record from probate court, Mora county, New Mexico.....	86	62
Testimony of Mary E. Head.....	97	69
Policy loan agreement.....	97	69
Testimony of Martin Kellogg.....	99	71
Letter of April 5, 1904.....	104	75
April 13, 1904.....	105	76
April 18, 1904.....	105	76
April 22, 1904.....	107	77
April 29, 1904.....	107	77
Assignment of February 10, 1903.....	108	78
Loan policy agreement.....	110	79
Policy loan agreement.....	112	81
Application of April 3, 1904.....	114	82
Application of April 3, 1904.....	115	83
Letter of June 23, 1904.....	115	83
June 27, 1904.....	117	84
July 14, 1904.....	117	84
April 3, 1904.....	118	85
April 3, 1904.....	119	86
July 15, 1904.....	120	87
March 15, 1905.....	120	87
March 17, 1905.....	121	88
March 16, 1905.....	122	88
March 20, 1905.....	123	89
March 27, 1905.....	123	89
March 28, 1905.....	124	90
May 1, 1905.....	124	90
May 3, 1905.....	125	91
May 4, 1905.....	126	91
Telegrams, May 2 and 3, 1905.....	126	91

INDEX.

iii

Original. Print

Letter of May 4, 1905.....	127	92
May 3, 1905.....	127	92
Promissory note of April 3, 1905.....	128	93
Letter of June 12, 1905.....	130	94
April 18, 1906.....	130	94
December 26, 1905.....	131	95
Testimony of J. M. Cunningham.....	132	96
J. M. Stearns.....	133	96
T. W. Hayward.....	133	97
Plaintiff's requests for instructions.....	135	98
Defendant's requests for instructions.....	137	99
Findings and judgment.....	138	100
Motion in arrest.....	139	101
Motion for new trial.....	139	101
Affidavit and application for appeal.....	142	103
Order allowing appeal, &c.....	142	103
Orders as to bill of exceptions.....	143	103
Judge's certificate to bill of exceptions.....	144	104
Consent to bill of exceptions.....	144	104
Index to abstract.....	145	105
Argument and submission.....	147	105
Judgment, November 29, 1911.....	147	105
Opinion.....	148	106
Motion to transfer to court in banc.....	149	107
Order filing motion to transfer to court in banc.....	150	107
Order granting motion to transfer to court in banc.....	151	108
Argument and submission.....	151	108
Judgment, March 1, 1912.....	151	108
Opinion.....	153	109
Order filing motion for rehearing.....	154a	109
Motion for rehearing.....	154	110
Order filing suggestions in reply.....	155	111
Suggestions in reply to motion for rehearing.....	156	111
Order overruling motion for rehearing.....	158	112
Clerk's certificate.....	158	112
Order allowing writ of error, &c.....	159	113
Petition for writ of error.....	160	113
Assignment of errors.....	162	114
Citation and service (copy).....	167	117
Bond.....	168	118
Return to writ of error.....	170	119



1 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Missouri, before you, or some of you, being the highest court of law or equity of said state in which a decision could be had in the said suit between New York Life Insurance Company, defendant, plaintiff in error, and Richard G. Head, Jr., by his next friend, plaintiff, and defendant in error, wherein was drawn in question the construction of the Constitution of the United States and the amendments thereto, and the decision was against the right, privilege and immunity specially set up or claimed under such Constitution and the amendments thereto a manifest error hath happened to the great damage of the said New York Life Insurance Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 13th day of May, 1912, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States the 13th day of April, in the year of our Lord 1912.

[Seal of the United States District Court of Missouri,
Central Division, Western District.]

JOHN B. WARNER,
*Clerk of the District Court of the
United States for the Western Dis-
trict of Missouri, Central Division,*
By H. C. GEISBERG, Deputy.

2 The above entitled matter coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri and upon examination of said petition and record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States and that the bond presented by the petition be and the same is hereby approved.

HENRY LAMM,
*Presiding Judge of the Supreme Court
of Missouri en Banc.*

2½ [Endorsed:] New York Life Insurance Company, Plaintiff in Error, vs. Richard G. Head, Jr., by his next friend, Defendant in Error. Writ of Error and order allowing writ. Original. Filed Apr. 13 1912. J. D. Allen, Clerk.

3 In the Supreme Court of Missouri, October Term, 1911,
Court in Banc.

STATE OF MISSOURI, *et al*:

Be it remembered that heretofore, to-wit, on the 7th day of September, 1908, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, a certified copy of the judgment and order granting an appeal in a certain cause wherein Richard G. Head, by &c. was the respondent and the New York Life Insurance Company was the appellant, which said certified copy of the judgment and order granting an appeal is in words and figures as follows, to-wit:

Be it remembered that on the 53rd day of the regular April Term, 1908, of the Circuit Court of Jackson County Missouri, at Kansas City, the same being the 13th day of June, 1908, the following proceedings were had and made of record—before the Honorable James H. Slover, Judge of Division No. 6,—in the cause entitled:

29739.

RICHARD G. HEAD, JR., by B. F. DEATHERAGE, His Next Friend,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant.

Now again come the said parties, and this cause is submitted to the Court for trial on the pleadings and the evidence, a jury being waived by consent of parties. Thereupon the cause is submitted to the court upon the pleadings and evidence and arguments of counsel, and the court having duly considered the same, and all and singular the premises being seen and heard by the Court, the Court finds the issues in favor of the plaintiff and that the defendant is indebted to the plaintiff and plaintiff is entitled to recover from the defendant the sum of Seven thousand seven hundred twenty-five and 50/100 Dollars (\$7,725.50).

4 Wherefore, all and singular, the premises being seen and heard, it is considered, ordered and adjudged by the Court that the plaintiff Richard G. Head, Jr., by B. F. Deatherage his next friend, have and recover from and have judgment against the defendant the New

York Life Insurance Company, a corporation, for said sum of Seven thousand seven hundred twenty-five and 50/100 Dollars (\$7,725.50) together with plaintiff's costs in this behalf laid out and expended, and that execution issue therefor. This judgment bears interest at the rate of six per cent from this date.

Be it remembered that on the 83rd day of the regular April term, 1908, of the above court, the same being the 25th day of July, 1908, the following proceedings were had and made of record in the cause entitled:

29739.

RICHARD G. HEAD, JR., by Next Friend, B. F. DEATHERAGE,
vs.
NEW YORK LIFE INSURANCE COMPANY.

Now defendant makes application and files affidavit for appeal from the judgment of this Court, and upon exhibit of receipt showing payment of the sum of Ten Dollars (\$10.00) docket fee in the appellate court, to the Clerk of this Court, the Court sustained said application and allows appeal to the Supreme Court of the State of Missouri as prayed.

Now the Court fixes defendant's appeal bond in the sum of Thirteen Thousand Dollars (\$13,000.00), and said defendant is by the Court given until on or before ten days from the adjournment of this term of court in which to file said appeal bond, and until on or before the third day of the October, 1908, term of court in which to file its bill of exceptions herein.

5 Botsford, Deatherage & Young, Attorneys for Plaintiff.
Lathrop, Morrow, Fox & Moore, " " Defendant.

STATE OF MISSOURI,
County of Jackson, ss:

I, Oscar Hochland, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the judgment and order allowing appeal in the cause entitled: Richard G. Head, Jr., by next friend, B. F. Deatherage, Plaintiff, vs. New York Life Insurance Company, Defendant, as the same now appear of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at office in Kansas City, this 3rd day of September, A. D. 1908.

[SEAL.]

OSCAR HOCHLAND, Clerk,
By A. M. McCLANAHAN, Deputy.

And thereafter, to-wit, on the 14th day of October, 1911, the appellant filed its abstract of the record. Which said abstract of the record is in words and figures as follows, to-wit:

6 In the Supreme Court of the State of Missouri, October Term, 1911.

No. 15063.

RICHARD G. HEAD, JR., by His Next Friend, Respondent,
vs.
NEW YORK LIFE INSURANCE COMPANY, Appellant.

ABSTRACT OF THE RECORD.

Lathrop, Morrow, Fox & Moore, Attorneys for Appellant.

7 In the Supreme Court of the State of Missouri, October Term, 1911.

No. 15063.

RICHARD G. HEAD, JR., by His Next Friend, Respondent,
vs.
NEW YORK LIFE INSURANCE COMPANY, Appellant.

ABSTRACT OF THE RECORD.

The Pleadings.

This suit was begun in the Circuit Court of Jackson County, Missouri, at Kansas City, by filing in the said court September 20th, 1906, a petition, of which the following is a copy:

Petition.

Now on this day comes the above named Richard G. Head, Jr., by his next friend B. F. Deatherage, and states that the said Richard G. Head, Jr., is an infant over the age of fourteen (14) years and under the age of twenty-one (21) years and that he has
8 duly filed his petition with the said Circuit Court asking that B. F. Deatherage be appointed his next friend for the purpose of prosecuting this suit, and that the said B. F. Deatherage consented in writing to serve as such next friend and has agreed to be responsible for the costs of said suit according to the statutes of this state in such cases made and provided, and that this court has duly made an order appointing said B. F. Deatherage as next friend for the said Richard G. Head, Jr., for the purpose of instituting this suit and the said B. F. Deatherage has given bond as required by law in such cases, which bond has been duly approved by the clerk of this court.

2. That the defendant is now and was at all times hereinafter mentioned, a corporation, organized, created and existing under the laws of the state of New York and doing a general life insurance

business, and as such said company has obtained permission to do business in the state of Missouri and was doing such life insurance business in the state of Missouri on the 3rd day of April, 1894, and continuously thereafter up to the present time.

3. Plaintiff further states, that he is the son of Richard G. Head, Sr., and that on the 3rd day of April, 1894, the said defendant, by its policy of insurance numbered 599,691, in consideration of the sum of Four Hundred and Twenty-five Dollars (\$425.00) annual premium paid to it by said Richard G. Head, Sr., and the same sum to be paid on the 3rd day of April during each and every year thereafter during the continuance of the policy, did insure the life of said Richard G. Head, Sr., for the sum of Ten Thousand Dollars (\$10,000.00), to be paid in case of his death to Richard G. Head, Jr., son of the said Richard G. Head, Sr., the insured, said payment to be made immediately upon receipt and approval of the proofs of the death during the continuance of said policy, of said Richard G. Head, Sr.

4. That said policy was applied for by the said Richard G. Head, Sr., in the state of Missouri, at the branch office of the company at Kansas City in said state of Missouri, and said application was received by the company's agents in the state of Missouri, and said company afterwards approved said application and issued

9 said policy and delivered the same to the said Richard G. Head, Sr., the assured, in the state of Missouri, and for several years thereafter the premiums were paid by the insured to the company at its branch office in Kansas City, Missouri, and said policy became thereby a Missouri contract, to be governed and construed according to the laws of the state of Missouri in such cases made and provided.

5. A true verified copy of said policy is hereto annexed and made a part hereof.

6. Plaintiff further states that said Richard G. Head, Sr., kept and performed all the conditions of said policy on his part according to its terms, up to the 3rd day of April, 1905; that Richard G. Head, Sr., died on the 8th day of April, 1906, and that plaintiff furnished to defendant within the time required by said policy and within ninety (90) days from the date of the death of said Richard G. Head, Sr., and before the institution of this suit, due notice and proof of the death of said Richard G. Head, Sr.

7. Plaintiff further states, that said Richard G. Head, Sr., during his life time deposited said policy with defendant as security for a loan of Two Thousand Two Hundred and Seventy Dollars (\$2,270.00) loaned by said company to said Richard G. Head, Sr., and the plaintiff on the 3rd day of April, 1904.

8. That said Richard G. Head, Sr., paid all premiums annually as they became due upon said policy, from the date the same was issued, namely, April 3, 1894, to April 3, 1905; that when the premium due April 3, 1905, became due the said Richard G. Head, Sr., paid the sum of One Hundred and Seven Dollars (\$107.00) to defendant, or one-fourth of such premium, in cash, and gave his note to the defendant for the sum of Three Hundred and Eighteen

Dollars (\$318.00), the balance of said premium, due on the 3rd day of October, 1905, and the said Richard G. Head, Sr., also paid the interest upon the loan of Two Thousand Two Hundred and Seventy Dollars (\$2,270.00) up to April 3, 1906.

9. Plaintiff states that said note was received by the defendant in lieu of cash payment of said premium, which paid said
10 premium to April 3, 1906; that by the terms of said policy the insured was allowed thirty (30) days' grace after the maturity of said premium for the payment of additional premium due April 3, 1906, and said policy was continued in full force for the full amount thereof during said period of thirty (30) days' grace; that said Richard G. Head, Sr., died on April 8, 1906, and during said thirty days' grace and while said policy was in full force; that by reason of the premises the defendant thereupon became liable to pay to the plaintiff the said sum of Ten Thousand Dollars (\$10,000.00) less the amount of Two Thousand Two Hundred and Seventy Dollars (\$2,270.00) owing by the insured to said company, and less the premium of Four Hundred and Twenty-five Dollars (\$425.00) due on April 3, 1906, and less the amount of said note of Three Hundred and Eighteen Dollars (\$318.00) with interest thereon at five per cent. from April 3, 1905.

10. Plaintiff further states that he and the said insured have performed all the conditions of said policy on their part to be performed; that plaintiff has duly demanded of defendant payment of said sum with interest as aforesaid, which demand was refused.

Wherefore, plaintiff asks judgment against said defendant for the sum of Six Thousand Nine Hundred Seventy-one 10/100 Dollars (\$6,971.10) with interest thereon at six per cent per annum and for costs.

Second Count.

For a second and further cause of action against the defendant, plaintiff, by his next friend, says:

1. That the said Richard G. Head, Jr., is an infant over the age of fourteen (14) years and under the age of twenty-one (21) years, and that he has duly filed his petition with the said circuit court asking that B. F. Deatherage be appointed his next friend for the purpose of prosecuting this suit, and that the said B. F. Deatherage consented in writing to serve as such next friend and has agreed to be responsible for the costs of said suit according to the statutes of
this state in such cases made and provided, and that this court
11 has duly made an order appointing said B. F. Deatherage as next friend for the said Richard G. Head, Jr., for the purpose of instituting this suit, and the said B. F. Deatherage has given bond as required by law in such cases, which bond has been duly approved by the clerk of this court.

2. That the defendant is now and was at all times hereinafter mentioned, a corporation, organized, created and existing under the laws of the state of New York and doing a general life insurance business, and as such said company has obtained permission to do business in the state of Missouri and was doing such life insurance

business in the state of Missouri on the 3rd day of April, 1894, and continuously thereafter up to the present time.

3. Plaintiff further states that he is a son of Richard G. Head, Sr., and that on the 3rd day of April, 1894, the said defendant, by its policy of insurance numbered 599,691, in consideration of the sum of Four Hundred and Twenty-five Dollars (\$425.00) annual premium paid to it by said Richard G. Head, Sr., and the same sum to be paid on the 3rd day of April during each and every year thereafter during the continuance of the policy, did insure the life of said Richard G. Head, for the sum of Ten Thousand Dollars (\$10,000.00) to be paid in case of his death to Richard G. Head, Jr., son of the said Richard G. Head, Sr., the insured, said payment to be made immediately upon receipt and approval of the proofs of the death during the continuance of said policy, of said Richard G. Head, Sr.

4. That said policy was applied for by said Richard G. Head, Sr., in the state of Missouri, at the branch office of the company at Kansas City in said state of Missouri, and said application was received by the company's agents in the state of Missouri, and said company afterwards approved said application and issued said policy and delivered the same to the said Richard G. Head, Sr., the assured, in the state of Missouri, and for several years thereafter the premiums were paid by the insured to the company at its branch office in Kansas City, Missouri, and said policy became thereby a Missouri contract, to be governed and construed according to the laws of the state of Missouri in such cases made and provided.

12 5. A true verified copy of said policy is hereto annexed and made a part hereof.

6. Plaintiff further states that said Richard G. Head, Sr., kept and performed all the conditions of said policy on his part according to its terms, up to the 3rd day of April, 1905; that Richard G. Head, Sr., died on the 8th day of April, 1906, and that plaintiff furnished to defendant within the time required by said policy and within ninety (90) days of the date of the death of said Richard G. Head, Sr., and before the institution of this suit, due notice and proof of the death of said Richard G. Head, Sr.

7. Plaintiff further states, that said Richard G. Head, Sr., during his life time deposited said policy with defendant as security for a loan of two thousand two hundred and seventy dollars (\$2,270.00) loaned by said company to said Richard G. Head, Sr., and the plaintiff on the 3rd day of April, 1904.

8. That said Richard G. Head paid all premiums annually as they became due upon said policy, from the date the same was issued, namely, April 3, 1894, to April 3, 1905; that when the premium due April 3, 1905, became due the said Richard G. Head, Sr., paid the sum of One Hundred and Seven Dollars (\$107.00) to defendant, or one-fourth of such premium, in cash, and gave his note to the defendant for the sum of Three Hundred and Eighteen Dollars (\$318.00), the balance of said premium, due on the 3rd day of October, 1905, and the said Richard G. Head, Sr., also paid the interest

upon the loan of Two Thousand Two Hundred and Seventy Dollars (\$2,270.00) up to April 3, 1906.

9. Plaintiff further states that at the time of obtaining the loan of \$2,270.00 aforesaid the said insured owed the defendant the sum of Three Hundred and Ten Dollars (\$310.00) on a note given for cash premium, with interest thereon of \$4.80, and also owed the premium due April 3, 1904, amounting to Four Hundred Twenty-five Dollars (\$425.00) with interest amounting to \$6.55 thereon, making a total of Seven Hundred Thirty-six and 35/100 Dollars (\$736.35) owing by the insured to the defendant on account of premiums on said policy at the time of making said loan.

13 10. Plaintiff further avers that at the time of the failure to pay said note due October 3, 1905, the net value of said policy when computed upon the actuaries' or combined experience tables of mortality with four and one-half per cent interest per annum and after deducting from three-fourths of such net value any notes or other evidences of indebtedness to the company given on account of back premiums on said policies issued to the insured, taken as a net single premium for temporary insurance for the amount written in said policy, was the sum of Nine Hundred Sixty-four and 10/100 Dollars (\$964.10) and sufficient to continue said policy in force as determined by the age of the insured at the time of default in premium, long past the period at which said insured died, and that in consequence thereof said policy was in full force at the time of the death of said Richard G. Head, Sr.

11. Plaintiff further states that defendant thereupon became liable to pay the said Richard G. Head, Jr., the sum of Ten Thousand Dollars (\$10,000.00) less the amount of Two Thousand Two Hundred and Seventy Dollars (\$2,270.00) owing by the insured to said company.

12. Plaintiff further states that he and the said insured have performed all the conditions of said policy on their part to be performed; that plaintiff has demanded of defendant payment of said sum with interest as aforesaid, which demand was refused.

Wherefore plaintiff asks judgment against said defendant for the sum of Seven Thousand Seven Hundred and Thirty Dollars (\$7,730.00) with interest thereon at six per cent per annum from July 6, 1906, and for costs.

BOTSFORD, DEATHERAGE & YOUNG,

Attorneys for Plaintiff.

(The verified copy of the policy attached to the petition is set out in full on pages 27-39, following.)

The answer of defendant, upon which the case was tried, was as follows:

14

Answer.

Comes now defendant, the New York Life Insurance Company, and makes this, its answer, to the petition of the plaintiff filed herein, and for its answer to the first count admits that it is an incorporated company, engaged in life insurance business, and has obtained permis-

sion to do such business in the State of Missouri; and it admits that on the 3rd day of April, 1894, it issued its policy of insurance No. 599,691, upon the life of Richard G. Head (being the same person named in the petition as Richard G. Head, Senior); and admits that Richard G. Head, the assured, died in April, 1906; each and every other allegation in said petition contained is denied.

Further answering defendant states that on, to-wit, the 24th day of March, 1894, said Richard G. Head, then a resident of Watrous, Mora County, New Mexico, and at all times thereafter a resident of the Territory or State of New Mexico, and a non-resident of the State of Missouri, applied in writing to the defendant at its Home Office in the City of New York for said policy of insurance, the same to be payable to his son, Richard G. Head, Jr., then a resident of Watrous, New Mexico, and in said application said applicant agreed with this defendant that any policy which might be issued under said application, and the contract contained in such policy and said application should be construed according to the laws of the State of New York, the place of said contract being thereby agreed between said parties to be the Home Office of the defendant, in the City of New York; that said defendant, relying upon said agreement, accepted said application and in consideration thereof and of the agreements, statements and warranties therein contained, which were by the terms of said policy made a part of said insurance contract and of the annual payment of \$425.00 on the 3rd day of April in each year, insured the life of said Richard G. Head, of Watrous, in the County of Mora, New Mexico Territory, for the sum of \$10,000.00, as

15 evidenced by its said policy number 599,691. It was further agreed in and by said policy that all premiums thereon would be and become due and payable at the Home Office of the defendant in the City of New York, but might be paid to agents producing receipts signed by the President, Vice President, Second Vice President, Actuary or Secretary and countersigned by such agents, and that if any premium was not paid on or before the date when due, then except as provided in said policy the same should become void and all premiums previously paid should remain the property of the company; that said policy contained no provision for benefits in the event of lapse when there was a loan on the policy except that said policy was to be construed according to the laws of the State of New York, the place of said contract being the Home Office of said company in said City of New York, which said laws provided for non-forfeiture benefits in the event of lapse as hereafter more fully stated.

That by Section 88 of Chapter 690 of the Laws of 1892 of the State of New York, which was in full force and effect at the time said policy was taken out, it was provided that,—

“Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note given for a premium or loan made in cash on such policy as security or of any interest on such note or loan, the reserve on such

policy computed according to the American Experience table of mortality at the rate of four and one-half per cent per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the same time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse of forfeiture, or to purchase upon

16 the same life at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payments of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to present the forfeiture of the policy."

that no agreement was expressed in said application or policy as to which one of said benefits secured by said law should obtain in the event of lapse with an indebtedness against said policy.

That on, to-wit, the 3rd day of April, 1904, said plaintiff and said Richard G. Head, Sr., duly obtained from said defendant a loan on said policy of the sum of \$2,270.00, and as collateral security for the re-payment of the loan with interest, duly pledged and deposited said policy and its accumulations with said defendant pursuant to their loan agreement for that purpose then and there made, executed and delivered to the defendant; that it was provided in and by said loan agreement that if any premium on said policy or interest on said loan was not paid on the date when due, settlement of said loan and of any other indebtedness on said policy should be made by continuing said policy without further notice as paid-up insurance of reduced amount in accordance with said Section 88 of Chapter 690 of the Laws of 1892 of the State of New York.

That neither the premium due April 3rd, 1905, nor any part thereof ever was paid, but when the same became due and payable said insured requested said defendant to, and pursuant to said request, did receive the sum of \$107.00 in cash together with his written agreement in words and figures following, to-wit:

Pol. No. 599,691. Sept. 28, 1905.

72960.

LAS VEGAS, N. M., April 3, 1905.

17 On on before six months Oct. 3, after date, without grace, and without demand or notice, I promise to pay to the order of the New York Life Insurance Company, Three Hundred and Eighteen Dollars at First National Bank, Albuquerque, N. M. (Name of city), value received, with interest at the rate of five per cent per annum. This note is accepted by said company at the re-

quest of the maker, together with One Hundred and Seven Dollars in cash on the following express agreement:

That although no part of the premium due on the third day of April, 1905, under policy No. 599,691, issued by said company on the life of Richard G. Head has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or by the laws of any state in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms.

(Name) RICHARD G. HEAD, (Name)

\$318.00.

Guardian for Richard G. Head, Jr.,

(Address) *Las Vegas, N. M.* (Address)

1771, June, 1904.

That no part of the sum named in said note ever was paid and by reason of said default said agreement six months after said
18 April 3, 1905, automatically ceased to be a claim against the maker thereof, and said company as agreed in said contract retained said cash as part compensation for the rights and privileges thereby granted, and thereupon all rights under said policy became and were the same as if said cash had not been paid nor said agreement made; that at the time of executing the above instrument said Head paid the defendant interest on said loan to the third day of April, 1906; said defendant duly offered and tendered return of the unearned part of said interest, to wit, the sum of \$56.25, but said offer was refused and said defendant now holds the same subject to the order of the person legally entitled thereto, itself claiming no right, title or interest therein.

That said policy lapsed as aforesaid for the non-payment of said April 3, 1905, annual premium, and thereupon, pursuant to said loan agreement a copy of which is hereto attached marked "Exhibit A," said parties became entitled to paid-up insurance of a reduced amount in accordance with said Section 88 of Chapter 690 of the Laws of 1892 of the State of New York; that the amount of paid-up insurance so purchasable was the sum of \$101.00; that on the 4th day of April, 1906, pursuant to said loan agreement and said law of New York said defendant duly settled said indebtedness out of said

reserve on said policy and cancelled said loan agreement and endorsed said policy as paid-up insurance for said \$101.00, and thereupon duly transmitted the same so endorsed to said plaintiff, who duly received and ever since has retained the same and now holds said policy as paid-up policy of insurance for \$101.00, as will more fully appear by inspection of the copy thereof that is made a part of the plaintiff's petition.

That immediately upon receipt and approval of proofs of death of said insured and before the commencement of this suit, said defendant duly tendered to said plaintiff payment of said sum of \$101.00, but said plaintiff refused to receive the same upon the claim that said defendant was liable on said policy for the full sum of
19 \$10,000.00, and said defendant now brings into court said sum of \$101.00 for the use and benefit of said plaintiff.

Wherefore, having fully answered, defendant prays it may go hence with its costs.

For its answer to the second count, defendant admits that it is an incorporated company, engaged in the life insurance business, and has obtained permission to do such business in the State of Missouri; and it admits that on the 3rd day of April, 1894, it issued its policy of insurance, No. 599,691, upon the life of Richard G. Head (being the same person named in the petition as Richard G. Head, Senior); and admits that Richard G. Head, the assured, died in April, 1906; each and every other allegation in said petition contained is denied.

Further answering, defendant states that on, to-wit, the 24th day of March, 1894, said Richard G. Head, then a resident of Watrous, Mora County, New Mexico, and at all times thereafter a resident of the Territory or State of — Mexico, residing at the time of his death at Las Vegas, New Mexico, and a non-resident of the State of Missouri, applied in writing to the defendant at its Home Office in the City of New York for said policy of insurance, the same to be payable to his son, Richard G. Head, Jr., then a resident of Watrous, New Mexico, and in said application said applicant agreed with this defendant that any policy which might be issued under said application, and the contract contained in such policy and said application should be construed according to the laws of the State of New York, the place of said contract being thereby agreed between said parties to be the Home Office of the defendant, in the City of New York; that said defendant, relying upon said agreement, accepted said application and in consideration thereof and of the agreements, statements and warranties therein contained, which were by the terms of said policy made a part of said insurance contract and of the annual payment of \$425.00 on the 3rd day of April in each year,

insured the life of said Richard G. Head, of Watrous, in the
20 County of Mora, New Mexico Territory, for the sum of \$10,000.00, as evidenced by its said policy number 599,691. It was further agreed, in and by said policy, that all premiums thereon would be and become due and payable at the Home Office of the defendant in the City of New York but might be paid to agents producing receipts signed by the President, Vice President, Second Vice President, Actuary or Secretary and countersigned by such agents, and that if any premium was not paid on or before the date when

due, then except as provided in said policy the same should become void and all premiums previously paid should remain the property of the company; that said policy contained no provision for benefits in the event of lapse when there was a loan on the policy except that said policy was to be construed according to the laws of the State of New York, the place of said contract being the Home Office of said company in said City of New York, which said laws provided for non-forfeiture benefits in the event of lapse as hereafter more fully stated.

That by Section 88 of Chapter 690 of the Laws of 1892 of the State of New York, which was in full force and effect at the time said policy was taken out, it was provided, that,

"Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms lapse or become forfeited for the non-payment of any premium or any note given for a premium, or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American Experience Table of Mortality at the rate of four and one-half per cent per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rate of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that

21 amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payments of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent forfeiture of the policy," that no agreement was expressed in said application or policy as to which one of said benefits secured by said law should obtain in the event of lapse with an indebtedness against said policy.

That on, to-wit, the 3rd day of April, 1904, said plaintiff and said Richard G. Head, Sr., duly obtained from said defendant a loan on said policy of the sum of \$2,270.00, and as collateral security for the re-payment of the loan with interest, duly pledged and deposited said policy and its accumulations with said defendant pursuant to their loan agreement for that purpose then and there made, executed and delivered to the defendant; that it was provided in and by said loan agreement that if any premium on said policy or interest on said loan was not paid on the date when due, settlement of said loan and of any other indebtedness on said policy should be made by continuing said policy without further notice as paid-up insurance of reduced amount in accordance with said Section 38 of Chapter 690 of the Laws of 1892 of the State of New York.

That neither the premium due April 3rd, 1905, nor any part thereof ever was paid, but when the same became due and payable said insured requested said defendant to, and pursuant to said request said defendant did receive the sum of \$107.00 in cash, together with his written agreement in words and figures following, to-wit:

Pol. No. 599,691 Sep. 28, 1905, 72,960 Las Vegas, N. M., April 3, 1905.

On or before six months Oct. 3rd, after date, without
22 grace, and without demand or notice, I promise to pay to the order of the New York Life Insurance Company, Three Hundred and Eighteen Dollars at First National Bank, Albuquerque, N. M., value received with interest at the rate of five per cent per annum.

This note is accepted by said company at the request of the maker, together with \$107.00 in cash on the following express agreement:

That although no part of the premium due on the third day of April, 1905, under policy No. 599,691, issued by said company on the life of Richard G. Head has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all the rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or by the laws of any state in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms.

(Name) RICHARD G. HEAD,

(Address) Las Vegas, N. M.,

Guardian for Richard G. Head, Jr."

\$318.00

1771. June, 1904.

that no part of the sum named in said note ever was paid and by reason of said default said agreement six months after said
23 April 3d, 1905, automatically ceased to be a claim against the maker thereof, and said company as agreed in said contract retained said cash as part compensation for the rights and privileges thereby granted, and thereupon all rights under said policy became and were the same as if said cash had not been paid

nor said agreement made; that at the time of executing the above instrument said Head paid the defendant interest on said loan to the 3rd day of April, 1906; said defendant duly offered and tendered return of the unearned part of said interest, to-wit, the sum of \$56.25, but said offer was refused and said defendant now holds the same subject to the order of the person legally entitled thereto, itself claiming no right, title or interest therein.

That the insured did not owe said April 3rd, 1905, premium in the sense that he had in any way obligated himself to pay, but it was one of the conditions of said loan that if the defendant made the same said premium and said interest should be deducted from the amount thereof, which was done, and the defendant further says that at the time of making said loan there was a further indebtedness on said policy of \$1,100.00 incurred for prior premiums paid thereon, so that at the time of said loan the total premium indebtedness thereon with interest was the sum of \$1,941.70.

That said policy lapsed as aforesaid for the non-payment of said April 3rd, 1905, annual premium, and thereupon, pursuant to said loan agreement a copy of which is hereto attached marked Exhibit "A," said parties became entitled to paid-up insurance of a reduced amount in accordance with said Section 88 of Chapter 690 of the Laws of 1892 of the State of New York; that the amount of paid-up insurance so purchasable was the sum of \$101; that on the 4th day of April, 1906, pursuant to said loan agreement and said law of New York said defendant duly settled said indebtedness out of said reserve on said policy and cancelled said loan agreement and endorsed said policy as paid-up insurance for said \$101.00, and thereupon duly transmitted the same so endorsed to said plaintiff, who

24 duly received and ever since has retained the same and now holds said policy as paid-up policy of insurance for \$101.00, as will more fully appear by inspection of the copy thereof that is made a part of the plaintiff's petition.

That immediately upon receipt and approval of proofs of death of said insured and before the commencement of this suit, said defendant duly tendered to said plaintiff payment of said sum of \$101.00, but said plaintiff refused to receive the same upon the claim that said defendant was liable on said policy for the full sum of \$10,000.00, and said defendant now brings into court said sum of \$101.00, for the use and benefit of said plaintiff.

Wherefore, the defendant, having fully answered, prays that it may go hence with its costs.

EXHIBIT "A."

(Copy.)

SPECIAL NOTICE.—The Policy Loan made under this agreement is not conditioned upon any obligation or requirement to make application for additional insurance, and no person is authorized to make any charge for obtaining it.

Policy Loan Agreement.

The undersigned, Richard G. Head, guardian of Richard G. Head, Jr., and Richard G. Head hereby acknowledge the receipt this 3rd day of April, 1904, of the sum of Twenty-two Hundred Seventy Dollars (\$——), from the New York Life Insurance Company, at the City of New York, as a loan under Policy No. 599,691 issued by said company on the life of Richard G. Head in accordance with, and subject to the terms of said policy; and as collateral security for the repayment of said loan, with interest, hereby pledge and deposit said policy and its accumulations with said company, subject to the following conditions:

1. Interest on said loan shall be paid in advance from this date to the 3rd day of April, 1905, the date of the next anniversary of said policy, and annually in advance on and after said date, at the rate of five (5) per cent per annum, at the Home Office of said Company in the City of New York.

2. If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount, in accordance with Section 88, Chapter 690, of the Laws of 1892 of the State of New York.

3. The right to repay said loan to said Company at any time before settlement shall have been made in accordance with Section 2 of this agreement, and to reclaim possession of said policy, is hereby reserved. The repayment of said loan and accrued interest, if any, shall cancel and annul this agreement without further action.

4. In the settlement of any claim or of any benefit under said policy, before said loan shall have been fully repaid, or before settlement shall have been made in accordance with Section 2 of this agreement, said Company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy.

5. Any interest paid beyond the date of any repayment or settlement, as herein provided, shall be refunded.

6. As the amount of loan available at any time includes any previous loan then unpaid, the execution of a subsequent Loan Agreement, without further action, cancels and annuls any previous agreement.

7. Any notice under this agreement duly addressed and mailed to the last known postoffice address of the undersigned shall be deemed to have been served on the day following the date of said mailing.

RICHARD G. HEAD, [L. s.]
Guardian of Richard G. Head, Jr.
RICHARD G. HEAD. [L. s.]

Signed and sealed in presence of
WM. G. HAYDON.

J. C. Whitney, 2270, Auditor, July 26, 1904, per W. G. K. Auditor's Dept. Apr. 11, 1906.

Foreclosed and paid by deducting the amount of debt from the value of the policy.

— — —, *Secretary.*

Forwarded from Pueblo Branch Office June 27, 1904. Mr. Kellog, Cashier.

26 The reply to this answer is as follows:

Again comes said plaintiff and for reply to the last amended answer filed by defendant in the above entitled cause says plaintiff denies generally each and every allegation, averment and matter of whatsoever kind in said amended answer contained. And having fully replied, plaintiff prays judgment as, in and by its petition herein.

Record Entries.

Upon the issues thus framed, a trial was had on the 6th day of February, 1908. The cause was tried before the court without a jury, a jury having been waived by the parties to the suit. At the close of the hearing, the court took the case under advisement and on the 13th day of June, 1908, at the April Term of court, rendered judgment against the defendant-appellant for \$7,725.50 and costs and interest at the rate of six per cent. per annum from June 13th, 1908.

In due time, to-wit, on the 17th day of June, 1908, during the April Term of court, and within four days of the date of said judgment, the defendant-appellant filed its motions for new trial and in arrest of judgment, which were overruled.

Thereafter and on the 23rd day of July, 1908, the defendant filed its affidavit and application for an appeal to this court, which was allowed, and certified copy of the judgment and order allowing appeal was in due time filed in this court.

When the appeal was taken, the appellant was given until on or before the third day of the October Term, 1908, for filing its bill of exceptions.

On the 12th day of October, 1908, it being the first day of the October Term, the court, for good cause, ordered that the appellant be allowed until on or before the third day of the January Term, 1909, to file its bill of exceptions.

On the 12th day of January, 1909, at the January term, the court, for good cause shown, ordered that the time for filing bill of exceptions be extended until the third day of the April Term, 1909.

On the first day of the April Term, 1909, the court, for good cause, ordered that the appellant have until June 1st, 1909, to file its bill of exceptions.

On the 29th day of May, 1909, and during the April term, for good cause shown, the court ordered that the defendant have until the 15th day of June, 1909, to file bill of exceptions.

On the 14th day of June, 1909, (during the April Term), for good cause shown, the court ordered that the defendant have until July 1st, 1909, to file its bill of exceptions.

On the 29th day of June, 1909 (during the April Term), for good cause, the court ordered that the defendant have until on or before the 1st day of November, 1909, to file its bill of exceptions, and on the 22nd day of October, 1909, the defendant offered its bill of exceptions in this cause, which was by the court duly signed and ordered filed as the appellant's bill of exceptions herein, which was done.

The entire bill of exceptions in this cause and the evidence submitted is as follows:

28

Bill of Exceptions.

Be it remembered that on the 6th day of February, 1908, and thereafter, and at the January Term, 1908, of said circuit court, this cause came on to be heard before the Hon. James H. Slover, judge of said court.

The plaintiff appeared by Messrs. Botsford, Deatherage & Young, his attorneys.

The defendant appeared by Mr. Cyrus Crane and Mr. O. W. Pratt, of Lathrop, Morrow, Fox & Moore, its attorneys.

And thereupon the following, among other proceedings, were had, to wit: The plaintiff in order to maintain the issues on his part, offered and introduced evidence as follows:

B. MAGILL, sworn, testified on behalf of plaintiff as follows, on

Direct examination by Mr. DEATHERAGE:

Q. What is your name?

A. B. Magill.

Q. You reside in Kansas City?

A. Yes, sir.

Q. During the year 1894 were you acquainted with Col. Head?

A. Yes, sir.

Q. Richard G. Head, Senior?

A. Yes, sir.

Q. At that time were you employed in any way with the New York Life Insurance Company?

A. Yes, sir, employed to solicit insurance.

Q. At what place?

A. Anywhere in this territory I saw fit to go.

Q. Here at Kansas City?

A. Yes, sir.

Q. At the Kansas City office?

A. Yes sir, Jackson county, Platte county and Clay county, I think and in part of Kansas.

Q. You worked under the Kansas City branch office?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Did you take Mr. Head's application for insurance at that time?

A. Yes, sir.

29 Q. Where did you take that application?

A. In the New York Life building, Kansas City, Missouri.

Q. Is that the application referred to (showing paper)?

A. Yes, sir.

Q. Is that your signature to that paper?

A. Yes, sir.

Q. Is that Col. Head's signature?

A. Yes, sir.

Q. You saw him sign it?

A. Yes, sir.

Mr. DEATHERAGE: I offer that in evidence, which is in words and figures as follows:

(The application is set out in full on pages 33-39, following:)

(Mr. DEATHERAGE:)

Q. After you took that application what did you do with it?

A. I turned it into the office.

Q. What office?

A. Into the branch office in Kansas City.

Q. Of the New York Life Insurance Co.?

A. Yes, sir.

Q. Here at Kansas City?

A. Yes, sir.

Q. And in due course of time did you receive any policy issued on that application?

A. Yes, sir, two policies.

Q. From whom did you receive the policies?

A. I reckon I received it from Mr. White. I do not remember who handed me the policy.

Q. Who was Mr. White?

A. The cashier.

Q. At the branch office?

A. Yes, sir. I may have received it from Mr. Lyon, one of the two. I do not know which.

Q. The application was sent into the home office and upon its being approved and the policy returned here, he simply returned it to you as soliciting agent?

A. Yes, sir.

Q. Was this one of the policies delivered?

A. I never had but two policies on Richard G. Head's life and I have no remembrance of the numbers; I suppose it is.

Q. To whom did you deliver this policy upon its return to you by the company?

A. I delivered these policies to you (Deatherage); I delivered those policies to you on Mr. Head's order.

30 Q. At what place did you deliver them to me?

A. At my office in the New York Life Building, Kansas City, Mo.

Q. Did you deliver them to me for Mr. Head?

A. Yes, sir, he asked me to deliver them to you.

Q. You may state whether he paid the first premium to you?

A. When I wrote that insurance I took Mr. Head's note, I think thirty day note.

By Mr. PRATT: When you took the application?

A. Yes, sir; I took the note and his instruction was to leave the policies, if I got them, with Mr. Deatherage, he would be here at the time the note became due and he would pay the note and he did and paid the note.

Mr. DEATHERAGE: The application being dated March 24th, you say you took a thirty day note?

A. I think it was a thirty or sixty day note.

Q. The note was paid?

A. Yes, sir, when it was due.

Q. You accounted to the company for the first premium?

A. Yes, sir.

Q. You paid the company?

A. Yes, sir.

Q. And took Head's note and he paid you the note?

A. Yes, sir.

Q. And all that took place in Kansas City, Mo.?

A. Yes, sir.

Q. Mr. Head came here frequently at that time, did he not?

A. Yes, sir, I met him here frequently; I tried to write him several times before.

Q. Do you know what business he was engaged in?

A. He was in the stock business, ranch business.

Q. Did his live stock business occasion his coming here often?

A. I suppose that was the occasion of his coming here.

Q. You spoke of his giving you a check on the Drumm-Flato Commission Company?

A. Yes, sir. He drew a draft on the Drumm-Flato Commission Company.

Q. That company is a live stock commission company doing business at the stock yards?

A. Yes, sir, he told me at the time he was a stockholder in that company.

Q. And wrote checks on them?

A. Yes, sir.

31 Cross-examination.

(By Mr. PRATT:)

Q. You were not authorized as an agent of the company to agree to any terms of insurance, or modify any insurance contract in any way?

Mr. DEATHERAGE: We object to that.

A. No, sir.

Q. Now when you sent this application, did any letter follow it, you wrote?

A. I simply turned it over to the cashier in the office, or the clerk, I do not know what went with it.

Q. Do you remember the conversation which occurred at the time there?

A. No, I do not.

Q. No recollection whatever?

A. No, sir, it was a transaction we had every once in a while, every few days, I simply took it to them and he took charge of that matter and turned it in.

Q. And as far as you know nothing was said where it was taken, the application?

A. You mean where it went to after, no, sir.

Q. Nothing of that sort occurred, simply an operation like this: you got the application somewhere in Kansas City?

A. Yes, sir.

Q. Signed by Mr. Head somewhere in Kansas City?

A. Yes, sir.

Q. Probably in the New York Life Building?

A. Yes, sir, it was signed there.

Q. Where was it signed?

A. It was signed in the New York Life Building.

Q. At Mr. Deatherage's office?

A. Yes, sir.

Q. That is not a part of the New York Life Company's office?

A. No, sir, it is a building.

Q. Just in the building?

A. Yes, sir.

Q. And after it was signed you simply took the application down to the office of the New York Life Company and turned it in?

A. Yes, that is what I did.

Q. And did not give him any information where you took the policy?

A. No, they never ask those questions.

Q. It might have been taken anywhere in the territory you were operating in?

A. I suppose it might.

32 Q. It might have been taken down at the stock yards for aught the company knew?

A. Yes, sir.

Q. And it might have been taken on the other side of the Kansas City line where the principal part of the stock yards are, as far as the company knew?

A. It was not taken there.

Q. You do not mean to say that the New York Life Company knew this policy was going to be delivered in Kansas City, Mo., when it was sent to you, do you?

Mr. DEATHERAGE: We object to that as incompetent, irrelevant and immaterial.

A. I do not know what the New York Life Company knew.

Mr. DEATHERAGE: You were the agent of the company and acting for the company?

A. Yes, sir.

Q. In the matter?

A. Yes, sir.

Q. Both in receiving the application and delivering the policy?

A. Yes, sir.

Mr. DEATHERAGE: I offer in evidence this policy, which said policy is in words and figures as follows:

Mr. PRATT: The defendant objects to policy number 599,691 for the reason that by the terms of the policy itself including the endorsements upon the policy, it appears that the policy is a paid-up policy of insurance, whereas the petition in the case is not a petition upon a paid-up policy.

In other words I object to this policy for the reason that it does not support the allegations in the petition and it is therefore incompetent, irrelevant and immaterial.

By the COURT: It will be admitted subject to the objection. Defendant then and there duly excepting.

33	Number	Amount.
	599,691.	\$10,000.
	Annual Premium \$425.00.	
	Age 47.	

The New York Life Insurance Company by this policy of insurance doth promise and agree to pay ten thousand dollars at its office in the city of New York to Richard G. Head, Jr., son of the insured; or, in the event of his prior death, to the insured's executors, administrators or assigns, immediately upon receipt and approval of proofs of the death during the continuance of this policy of Richard G. Head of Watrous in the county of Mora, New Mexico Territory, (herein called the insured.)

This contract is in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of four hundred and twenty-five dollars and — cents, to be paid in advance, and of the payment of a like sum on the third day of April in every year thereafter during the continuance of this policy.

Examined.

Incontestability.—After this policy shall have been in force one full year, if it shall become a claim by death the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.

The benefits and provisions placed by the company on the next page are a part of this contract, as fully as if recited over the signatures hereto affixed.

Ordinary Life Accumulation. 94-74.

In Witness Whereof, the said New York Life Insurance Company has, by its duly authorized officers, signed and delivered this contract, this third day of April, one thousand eight hundred and ninety-four.

JOHN A. McCALL, *President.*

CHAS. C. WHITNEY, *Secretary.*

34 (Stamped across the face of the policy is the following:)

This policy is endorsed for paid-up insurance under the conditions of the statement on the next page.

Benefits and Provisions Referred to in This Policy.

Benefits at End of Accumulation Period.

If the insured is living on the third day of April, in the year Nineteen hundred and fourteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:

First. To continue the policy and receive the dividend then apportioned by the company, either

1 in cash; or

2 in an annuity, to be used in reduction of premiums or to be taken in cash, or

3 in additional paid-up insurance, conditioned upon satisfactory re-examination.

Second. To exchange the policy for its entire value, as stated below (X), either

4 in cash; or

5 in an annuity for life; or

6 in paid-up policy. (No re-examination required.)

X (The said entire value of the policy consists of the guaranteed reserve for forty six hundred and forty dollars (\$4,640), and in addition thereto the dividend then apportioned by the company.)

The insured shall notify the company, in writing, prior to the end of the Accumulation Period, which benefit is selected. Failing such notification, the apportioned dividend shall be applied to the purchase of an annuity as stipulated in benefit (2) above.

Dividends.

No dividend shall be apportioned or paid on this policy before the end of the Accumulation Period. If this policy is continued
35 in force beyond the Accumulation Period and if all premiums due have been paid, a dividend will be apportioned to the insured at the end of each period of five years thereafter.

Advances Within Accumulation Period.

The company will make advances as loans upon this policy at the fifth or any subsequent anniversary of the insurance, within the Accumulated Period, under the following conditions:

First. That premiums are paid in full to the time when the loan is made, including the premium for the entire insurance year then beginning.

Second. That the aggregate amount of loans outstanding from the sixth to the tenth years, inclusive, shall not exceed \$1,100; from the

eleventh to the fifteenth years, inclusive, shall not exceed \$2,270; and from the sixteenth to the twentieth years, inclusive, shall not exceed \$3,470.

Third. That the policy shall be duly assigned to the company as collateral security for the loans, and deposited at the Home Office.

Fourth. That interest at the rate of five per cent per annum shall be paid upon all such loans at the anniversary of the insurance next succeeding, and annually thereafter until the loans are paid off.

Fifth. That the loans shall be for such time as the borrower may elect, not longer, however, than to the end of the Accumulated Period.

(Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.)

Powers Not Delegated.

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by
36 making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.

Payment of Premiums.

All premiums are due and payable at the Home Office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

Grace.

After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium, with interest as above remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of insurance.

Proofs of Death.

Within one year after the death of the insured the company must be furnished at its office in the city of New York, with proofs of death which shall comprise satisfactory statements establishing the

claims. Such statements must comply fully with the company's present forms.

If it is found that the age of the insured was understated in the application, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the
37 required premium at the true age.

Assignments.

Any assignment of this policy must be made in duplicate, and both copies must be sent to the Home Office, one of them to be retained by the company. The company has no responsibility for the validity of any assignment.

Non-forfeiture.

After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy, and provided the policy has not been terminated by death within the month of grace allowed in the payment of premiums (1) the insurance will be extended for the face amount, as provided in the table below, or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid up insurance will be issued for the reduced amount provided in the said table; or (3) the policy will be re-instated within the said six months, upon payment of the overdue premium with interest at the rate of five per cent per annum, if the insured is shown by evidence satisfactory to the company to be in good health.

38

Table of Guarantees if Payment of Premiums is Discontinued.

Provided there is no indebtedness against the Policy. (Pursuant to the Insurance Law Chapter 690, Laws of 1892 of the State of New York.)

If the premiums are paid:		1.		or		2.	
		The insurance of \$10,000,		The policy may be converted		into non-participating paid-up in-	
		will be extended				surance	
to	Ap'l 3rd	1897	Ap'l 3rd	1900	of	\$920	
"	"	1898	"	1902	"	1360	
"	"	1899	"	1904	"	1800	
"	"	1900	"	1906	"	2140	
"	"	1901	"	1908	"	2470	
"	"	1902	"	1909	"	2790	
"	"	1903	"	1911	"	3100	
"	"	1904	"	1912	"	3400	
"	"	1905	"	1913	"	3700	
"	"	1906	"	1914	"	3980	
"	"	1907	"	1915	"	4250	
"	"	1908	"	1917	"	4520	
"	"	1909	"	1918	"	4780	
"	"	1910	"	1919	"	5020	
"	"	1911	"	1919	"	5260	
"	"	1912	"	1920	"	5490	
"	"	1913	"	1921	"	5710	

39 Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extend insurance or reduce paid-up insurance, on the same basis as that on which the above table is constructed.
2153.

In accordance with the terms of the loan agreement of the 3rd day of April, 1904, and on account of default in the payment of April 3rd, 1905, premium and loan interest this policy is continued as paid-up insurance for \$101.00.

New York, April 4, 1904.

A. E. ORR, *President*.

SEYMOUR M. BALLARD, *Secretary*.

WM. W. VERNER, *Registrar*.

Abstract (E. & O. E.) of the Application for Insurance in the New York Life Insurance Co.

599,690.

1. Name (in full) of the person applying for insurance on his life: Richard G. Head.

2. A. Residence: State New Mexico, County Mora, Town Watrous. B. Place of business Watrous, New Mexico.

3. A. Occupation or employment: If more than one state all. Stock & Farming. B. Are you married? Yes.

NOTE.—It is not a sufficient answer to state (for example "Merchant," "Mechanic," "Salesman," or "Clerk"; the particular branch of business or trade is to be specified; and full particulars given, especially where the occupation is in any way hazardous.

4. Place of birth, Mo. B. Race or Nationality White. C. Born on 6 day of April, 1847. D. Age nearest birthday 47

5 If you have any insurance on your life state in what companies when taken the kind of policies and their respective amounts

I have no insurance except 30,000—in New York Life 10,000 3-22-1886 10,000 30-6-88 & 10,000 20-3-1899.

40 6. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued as applied for?

A. No.

B. If so to what company, etc. B. —.

7. A. To whom is the insurance applied for to be payable in event of death? (Name in full) Richard G. Head, Jr., B. Present residence. Watrous. C. Relationship to you, Son.

8. If the application is for an endowment or limited-endowment policy to whom is the endowment to be payable at its maturity?

NOTE.—This question refers only to policies issued on the endowment or limited-endowment premium-tables not to policies issued on any life table.

9. A. Do you desire a policy on the "Accumulation Policy" plan as set forth in that policy form? Yes. B. If so which accumulation period do you select? I select the 20 year accumulation period.

C. Do you desire a policy with "Premium-Return in case of death within the Accumulation Period? No. D. If so, is such return to be equal to one-half of all the premium paid? Equal to the premium paid.

10. Sum to be insured, \$20,000—Premium payable annually. On what table? Ordinary Life. Write 2 policies of \$10,000 each. Note: Strike out the rates not desired.

I do hereby agree, as follows: 1. That the statements and representations contained in the foregoing application, together with those contained in the declarations made by me to the Medical Examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete and true, whether written by my own hand or not; this warranty being a condition precedent to, and a consideration for the policy which may be issued thereon. 2. That inasmuch as only the officers at the home office of the said company, in the city of

41 New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statement and representations referred to, no statements, representations, promises, or information made or given by me or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing, and presented to the officers of said company, at the Home Office, in this application. 3. That in any distribution of surplus or profits the principles and methods which may be adopted by said company for such distribution and its determination of the amount equitably belonging to any policy which may be issued under this application shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such policy. 4. That any policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of the premium by said company of its authorized agent, during my life-time and good health. 5. That the contract, containing such policy and in this application shall be construed according to the law of the state of New York, the place of said contract being agreed to be the Home Office of said company in the city of New York. 6. That no suit shall be brought against said company under said contract after the lapse of two years from the time when the cause of action accrues.

Dated at Kansas City this 24th day of March, 1894.

Signature of the person applying for insurance on his life. (Write the name in full.)

RICHARD G. HEAD.

Witness.

B. MAGILL, *Agent.*

H. K. LYON,
Resident Manager.

42 Declarations made to the Medical Examiner of the New York Insurance Company.

1. Have you had, since childhood, any of the following complaints.

Answer yes or no opposite each.

Apoplexy	No	Disease of Kidneys	No
Asthma	No	Disease of Liver	No
Bilious Colic	No	Disease of Lungs	No
Cancer	No	Disease of Urinary Organs	No
Dropsy	No	Fistula	No
Disease of Brain	No	General Debility	No
Rheumatism	No	Gout	No
Serofula	No	Insanity	No
Small Pox	No	Jaundice	No
Spinal Disease	No	Paralysis	No
Spitting or Raising Blood	No	Piles	No
Syphilis	No	Pleurisy	No
Yellow Fever	No	Pneumonia	Yes

Give full particulars of any serious illness you may have had since childhood. Pneumonia in 1871.

When were you last confined to the house by illness? 1892.

How? Slight attack of La Grippe.

43 2. Have you ever had severe headaches, vertigo, fits or any nervous or muscular trouble? No.

3. A. Are you subject to coughs, expectoration, palpitation, or difficulty of breathing? No. B. Have you ever been? If so, to which, when and full details B. No.

4. Are you subject or predisposed to dyspepsia, dysentery or diarrhoea? No.

5. A. What is the name and residence of your physician A. None. B. When and for what have his services been required? B. —.

6. A. What other physician have you consulted? A. Dr. P. D. Childs, Lockhart, Texas. B. When and for what? B. Pneumonia 1871.

7. A. Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued as applied for? A. No. B. If so, to what company, when & etc. B. —.

8. Has any physician given an unfavorable opinion upon your life with reference to life insurance? If so, state particulars? No.

9. The Medical Examiner must obtain full and clear answers to each of the following queries Avoid all indefinite terms.

44	Age (if living).	Condition of health.	Age at death.	Cause of death.	How long ill.	Previous health.
Father	6	Good	85	Old age.		Good
Mother	45	"	Abt. 49	Don't know.	Some time	Good
4 Brothers				Inflam. of Bowels.		
—	Abt. 49	Good	37	Unknown.	Don't know.	Good
7 Sisters,	51		21	Don't know.		
Father's Father,	53		65	Don't know	Some time.	Good
Father's Mother,	55					
Mother's Father,						
Mother's Mother,						

Can give no definite information concerning grandparents. All were quite old and enjoyed good health as far as I know.

10. A. Have any of the above or any of your uncles or aunts now or ever had, consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity or other hereditary disease? A. None to my knowledge. B. if so, give full particulars of each case? B. —.

45 11. A. Are your habits at present time and have they always been sober and temperate? A. Yes. B. To what extent do you use intoxicating drinks as a beverage? (Average amount daily.) B. Don't use it daily and never spree C. Are you now engaged in any way in the retailing of alcoholic liquors? C. No. D. Have you ever been so engaged? D. No.

12. A. Where have you resided (during the summer and winter) during each of the last ten years? A. Denver, Colorado; Watrous, New Mexico. B. Do you contemplate changing your place of residence or making a journey? (Yes or no.) A. No. If yes, when and to what place?

13. A. How long have you been engaged in your present occupation? A. For many years. B. What was your business prior to your present occupation? B. None. C. Do you contemplate making any change, temporary or permanent in occupation? (Yes or No.) C. No. If yes, when and to what?

I hereby declare that the accompanying application to the New York Life Insurance Company dated March 24th, 1894, for an insurance on my life, was signed by me, and that I renew and confirm my agreement therein; and I also agree that I expressly waive all provisions of law forbidding any physician or other person who has attended or examined me from disclosing any knowledge or information which he thereby acquired.

RICHARD G. HEAD.

(Said policy being endorsed on the back thereof as follows:)

No. 599,691—New York Life Insurance Company assurance on the life of Richard G. Head. Amount, \$10,000. H. K. Lyon, Resident Manager, New York Life Building, Kansas City, Missouri. Kansas Branch New York Life Ins. Co. Agent.

46 Mr. DEATHERAGE: The plaintiff next offers in evidence the certificate of the superintendent of insurance department of the state of Missouri, showing that the New York Life Insurance Company was licensed to transact business in the state of Missouri during the year 1894, and continuously thereafter; this is introduced in evidence by the consent of counsel instead of taking the deposition, and which is in words and figures as follows:

Insurance Department, State of Missouri.

STATE OF MISSOURI,
County of Cole, ss:

I, W. D. Vandiver, Superintendent of the Insurance Department within and for the state of Missouri, do hereby certify that the New York Life Insurance Company of New York, New York, was duly licensed to transact business in the state of Missouri during the year 1894 and has been so continuously from that year up to the present day.

In Testimony Whereof, Witness my hand and the seal of this

department. Done at office in the city of Jefferson this the 6th day of January, 1908.

[SEAL.]

W. D. VANDIVER,
Superintendent,
By T. O. TOWLES,
Deputy Superintendent.

Mr. BOTSFORD: We now offer in evidence the same parts of the deposition I read in the other case of E. A. Anderson.

By the COURT: It will be received with the understanding that the other side may read any part of it or all of it.

Direct examination by Mr. McINTOSH:

Q. Please state your name, age, place of residence and occupation.

A. My name is Edward A. Anderson, age fifty-five; I reside at White Plains, New York, and my occupation is one of the Comptrollers of the New York Life Insurance Company, defendant.

Q. How long have you been comptroller of the defendant?

A. About four years.

47 Q. How long have you been employed in the defendant's comptroller's department?

A. Over seventeen years.

Q. In what capacities have you been employed in said department?

A. Examiner of Accounts, Chief Clerk of the Department, Assistant Superintendent of the Department, and Comptroller.

Mr. BOTSFORD (now at bottom of page 4).

Q. You may state if you know through what branch offices of the defendant all the premiums that were paid on the policy in question were reported to the defendant at its Home Office?

A. The April, 1894, premium was reported through the Kansas City Branch Office; the April, 1895, 1896, 1897 and 1898 premiums were reported through the New Mexico Branch Office; the April, 1899, premium was reported through the Kansas City Office; the April, 1900, premium through the New Mexico Branch Office, and the April, 1901, 1902, 1903, and 1904 premiums were reported through the Pueblo Branch Office.

Mr. BOTSFORD: Then on page 7 of the same deposition the following questions and answers:

Q. In 1894 did the Company have any Branch Office in the Territory of New Mexico?

A. No.

Q. When was the agency in New Mexico first established?

A. January 1, 1895.

Q. Was there any connection between the Kansas City agency and the New Mexico agency after the establishment of the latter agency?

A. None that I know of.

Q. Each was independent of the other, was it?

A. Yes.

Q. Did the Kansas City Agency act in any way through the New Mexico Agency, or was each independent of the other?

A. Each was independent of the other.

Mr. CRANE: We may just as well read the rest of it now, we are going to put it all in evidence.

By the COURT: Read it now if you wish.

Mr. Pratt here reads the deposition of Edward A. Anderson, with the exhibits attached thereto which is in words and figures as follows:

48 EDWARD A. ANDERSON, of lawful age, being duly sworn and examined on the part of the defendant, deposeth and saith:

Direct examination by Mr. McINTOSH:

Q. Please state your name, age, place of residence and occupation.

A. My name is Edward A. Anderson, age fifty-five, I reside at White Plains, New York, and my occupation is one of the comptrollers of the New York Life Insurance Company, defendant.

Q. How long have you been comptroller of the defendant?

A. About four years.

Q. How long have you been employed in the defendant's comptroller department?

A. Over seventeen years.

Q. In what capacities have you been employed in said department?

A. Examiner of accounts, chief clerk of the department, assistant superintendent of the department and comptroller.

Q. You may state whether or not the defendant now, and ever since the year 1894, inclusive, maintains and has maintained in various localities local offices which it designates as Branch Offices.

A. It has.

Q. What are and during all the time mentioned in the last question have been the functions and duties of these Branch Offices?

A. The function of the office is to receive applications from the agents, to transmit such applications to the home office, and if a policy is issued to receive the policy from the home office and turn it over to the agent for delivery to the insured and collection of the premium and I might add to report such premium to the home office when the same is turned over to it by the agent.

Q. In the year 1894, did any branch office of the defendant, or any person in or about the same, have any authority to accept risks of any kind; or to make, modify or discharge contracts of any kind, or to bind the company by any statement, promise or representation?

A. No.

Q. Where alone, if you know, could any of the things specified in the last question be done in the year 1894?

A. Only at the home office.

49 Q. For the purpose of receiving from the company's soliciting agents—those agents authorized to solicit applications for insurance—you may state whether or not its several branch

offices have assigned to them territory within which agents taking applications from residents of the territory, or agents working in that territory and taking applications from persons outside of the territory reported their applications through the branch office to the home office.

A. Yes.

Q. What was the especial territory assigned to the Kansas City branch office for this purpose for the year 1894?

A. The state of Kansas, part of Missouri, Oklahoma and Indian Territory.

Q. Were agents residing within this territory required to report their business to the company or transmit it to the company through the Kansas City office?

A. Yes.

Q. Whether they took an application within that territory or out of that territory?

A. Yes, all applications.

Q. You may state, if you know, as to whether or not the premium on policy No. 599,691, that became due in April, 1905, was ever paid, or any part thereof?

A. No part of that premium was paid.

Q. Was any special agreement or not made in respect of the premium on the policy in controversy in this suit that became due and payable on the third day of April, 1905?

A. Yes.

Q. Was that agreement in writing?

A. Yes.

Q. Have you that agreement in your hand?

A. I have.

Q. Will you identify it and attach a full, true, correct and certified copy thereof to your deposition, the defendant agreeing to produce the original on the trial?

A. I will, I have identified the agreement referred to as "Anderson's Exhibit B."

Q. You may state whether or not the sum named in "Anderson's Exhibit B," and therein agreed to be paid or any part thereof, ever was paid?

A. No.

Q. You may state if you know, through what branch offices of the defendant all the premiums that were paid on the policy
50 in question were reported to the defendant at its home office.

A. The April, 1904, premium was reported through the Kansas City Branch Office; the April, 1895, 1896, 1897 and 1898 premiums were reported through the New Mexico Branch Office; the April 1899 premium was reported through the Kansas City Office; the April, 1900, premium, through the New Mexico Branch Offices, and the April, 1901, 1902, 1903 and 1904, premiums were reported through the Pueblo Branch office.

Cross-examination by Mr. BOTSFORD:

Q. If I understand you, Mr. Anderson, no money was paid to the defendant by Mr. Richard, who obtained this insurance after the

giving of "Anderson's Exhibit B," dated April 3, 1905; was that what you said?

A. No.

Q. Was any money paid after the date of that note by Mr. Richard G. Head?

A. Money was paid after that date.

Q. How much?

A. \$107 and \$113.50, policy loan interest to April 3, 1906.

Q. He paid \$107; that is the sum named in this note, isn't it?

A. That is the sum named in this part of the note (witness indicates part of note mentioned.)

Q. In "Anderson's Exhibit B?"

A. Yes.

Q. Now you say \$113.50 was paid, and you added some words to that?

A. Policy loan interest.

Q. Then he paid besides the \$107, \$113.50, after April 3, 1905, the date of "Anderson's Exhibit B?"

A. Yes.

Q. Now are those all the sums that Mr. Richard G. Head, the party who paid these premiums, paid the company if any way after April 3, 1905, to the time of his death?

A. On account of that policy No. 599,691, yes.

Q. Have you the application here on which this policy was issued?

A. Yes.

Q. This is the paper which I hold in my hand that you produce as the application upon which this policy No. 599,691 was issued, is it?

A. Yes, sir.

The plaintiff offers this application in evidence and the same is filed herewith marked "Anderson's Exhibit A."

51 Q. Mr. Anderson, if I understand correctly, this is the same application upon which the policy in the other case of Mary Head against the New York Life Insurance Company, and the policy in which case was numbered 599,690 was issued?

A. Yes, sir.

Q. In other words, the policies in the two cases were both issued upon this application?

A. Yes.

Q. What other papers, if any, came to the company with this application at the time it was received?

A. I do not know of any.

Q. This application was undoubtedly received by the company here from the Kansas City Branch or the Kansas City Agency, whichever you may call it?

A. Yes.

Q. And the policies in the two cases were signed by the company here and sent back to the Kansas City Agency within a short time after the receipt of the application?

A. Yes.

Q. Was there a physical examination or anything of that sort accompanying this application on its receipt?

A. There must have been, yes. It is necessary to have it. I haven't it here.

Q. And after the return of these two policies in the two cases to the Kansas City Branch or Agency, the company here received the premium on the two policies, is that correct?

A. Yes.

Q. The initial premiums in both cases on both policies for the year 1894 were both paid through the Kansas City Agency or were reported through the Kansas City Branch?

A. Yes, were reported to us through the Kansas City Branch.

Q. In 1894 did the company have any branch office in the territory of New Mexico?

A. No.

Q. When was the agency in New Mexico first established?

A. January 1, 1895.

Q. Was there any connection between the Kansas City Agency and the New Mexico Agency after the establishment of the latter agency?

A. None that I know of.

Q. Each was independent of the other, was it?

A. Yes.

Q. Did the Kansas City Agency act in any way through
52 the New Mexico Agency or was each independent of the other?

A. Each was independent of the other.

Q. You spoke in your other deposition of one of these agencies, either the Pueblo or the other one, being established for the convenience of your patrons who were paying their premiums. Why was it done?

A. I said it was the practice of the company to establish branch offices for the convenience of the insured and also for the purpose of covering the field for business.

Q. The business that was transacted for the year 1894, so far as you have gone over it in connection with different agencies at Kansas City, New Mexico and Colorado, was, speaking generally, that of collecting premiums, was it not?

A. Yes.

Q. Each year as it would come around you would send a renewal receipt to some agency, the nearest one where Mr. Head lived, and notify him of the fact that his premium had become due, and you would afterwards receive the premium back; that is it?

A. Yes.

Redirect examination by Mr. McINTOSH:

Q. What became of the 1905 renewal receipt?

A. The 1905 renewal receipt was returned to the home office on account of lapse.

Q. At the time of sending a renewal receipt to the branch office was a notice also sent to the insured at what branch office to pay the premium?

A. That was our practice, I assume it was done in this instance.

Q. Now refer to your Exhibit "B." On your cross-examination you said that the \$107 described in your Exhibit "B" as having been received and the loan contract interest were not received after your Exhibit "B" was taken, but were received after April 3. What did you mean by your answers in that respect; explain them.

A. The date on this note, April 3, is the due date of the premium. It isn't necessarily the date when this note was made out; it is the due date of the premium.

Q. Were the payments to which you have referred, namely, the payment of \$107 and the payment of the loan interest, made at the same time that your Exhibit "B" was taken, and as a part of the same transaction?

A. Yes, that is true.

Q. You may state if you know, on what date the exhibit "B" transaction was actually made?

A. May 3, 1905.

Q. What was the purpose of the company in sending the policy in question to the Kansas City Branch?

A. In order that it might be delivered to the agent for delivery to the insured.

Q. You mean delivered to the agent who took the application?

A. Yes.

(Signed)

EDWARD A. ANDERSON.

(Anderson's Exhibit "A" (application) is set out on pages 33-39, preceding.)

ANDERSON'S EXHIBIT B.

Sept. 28, 1905.

Pol. No. 599,691.

LAS VEGAS, N. M., April 3, 1905.

On or before six months, Oct. 3, after date, without grace, and without demand or notice, I promise to pay to the order of the New York Life Insurance Company, three hundred and eighteen dollars at First National Bank, Albuquerque, N. M., value received, with interest at the rate of five per cent per annum.

This note is accepted by said company at the request of the maker, together with one hundred and seven dollars in cash on the following express agreement.

That although no part of the premium due on the third day of April, 1905, under policy No. 599,691, issued by said company on the life of Richard G. Head has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with the said cash, will then be accepted by said company as payment of said premium and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes

54 due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or by the laws of any state in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive and does hereby waive every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind been required as a condition to the full enforcement of all its terms.

(Signed)

RICHARD G. HEAD,
Address, Las Vegas, N. M.,
Guardian for Richard G. Head, Jr.

\$318.00.

(Stamped across face, "Unpaid.")

B. F. DEATHERAGE, sworn, testified on behalf of plaintiff as follows, on

Direct examination:

In 1894 I was attending to some legal business for Col. Head, in Kansas City, and had occasion to see him,—he was here often at that time; I remember Mr. B. Magill, the agent who testified here, took the application for these two policies of insurance and brought the policies to me and delivered them to me for Col. Head, and I put them in my safe; in a short time thereafter I delivered them to Col. Head, in my office in the New York Life building in Kansas City, Missouri. After his death I received the proofs of death sworn to; Miss Mary E. Head is one of his daughters; these statements were made by Miss Mary E. Head; statement number 1 as guardian for the beneficiary, Richard G. Head, Jr.; statement number 2 was made by Dr. Keipel, attending physician at the time of the death of Mr. Head; statement No. 3 was signed by P.

55 P. Friesen of Hutchinson, Kansas; these statements were all made upon blank forms furnished by the company.

In that connection I will offer the letter of the company addressed to Mr. W. G. Hayden, dated April 23rd, 1906, in which they enclose forms, and which is in words and figures as follows:

ALBUQUERQUE, N. M., April 23, 1906.

Re policies Nos. 599,690-'1—Head, Deceased.

Mr. W. G. Hayden, Las Vegas, N. M.

DEAR SIR: Referring to the matter of death claim on the above numbered policies, I am advised by the Home Office that policy No. 599,690 was endorsed for paid-up insurance \$89.00 and written in

favor of Richard G. Head, Jr., the insured's son, with reversion to insured. On May 19th, 1891, Richard G. Head, for himself and as guardian for Richard G. Head, Jr., assigned their interests in the policy to Mary E. Head. Policy No. 599,691 is endorsed for paid-up insurance, \$100.00 and written in favor of Richard G. Head, Jr., with reversion to the insured.

I enclose herewith proofs of death forms, which I will ask that you have executed and return to me.

Statement No. 1 on policy No. 599,690 should be made by Mary E. Head and statement No. 1 on policy No. 599,691 should be made by Richard G. Head, Jr. If this party is a minor, the statement must be made by a guardian and a certified copy of his appointment and authority must be furnished.

Statement No. 2 must be made by the physician in attendance at the last illness of the deceased and must be entirely in his own hand writing.

Statement No. 3 must be made by some responsible householder intimately acquainted with the insured and in no way interested in the claim.

All papers must be acknowledged before a notary public and a certificate from the county clerk to the effect that the notary is duly authorized to take such acknowledgments and also as to the genuineness of his signature must accompany the papers. Should
56 you desire further instructions, kindly refer to the back of each form, or correspond with me and I will be pleased to furnish you with information desired.

I would be pleased if you would have this matter adjusted at the earliest possible date and furnish us with the proofs in order that the claim may be settled.

Very truly yours,

JOHN F. DOOLEY, *Cashier.*

Mr. DEATHERAGE (continuing): Those statements as I have said, that one by Miss Mary E. Head was sworn to before Wm. G. Haydon, notary public, San Miguel county, New Mexico. Attached to the certificate was the certificate of the clerk of the probate court of San Miguel County, New Mexico, that W. G. Haydon was a duly authorized notary public; those other statements were all sworn to before S. F. Hutton, notary public and attached to his certificate was the certificate of the clerk of the district court of Reno County, Kansas, that S. F. Hutton was a notary public within and for said county and duly certified; those statements were all taken by me to the Branch Office of the New York Life Insurance Company, in Kansas City, Missouri, and received by Mr. P. H. Giedon, cashier, who gave me a written receipt for them, and I now offer in evidence his receipt for the same, which is in words and figures as follows:

JULY 7, 1906.

New York Life Insurance Co.

GENTLEMEN: We beg to hand you herewith proofs of death of Col. R. G. Head, under policy No. 599,691, consisting of:

1. Statement No. 1 of Mary E. Head as guardian for the beneficiary, Richard G. Head, Jr.

2. Statement No. 2 of Dr. C. Klippel, the attending physician at the time of his death.

3. Statement No. 3 of P. P. Frieson of Hutchinson, Kansas, all sworn to.

Also proofs of death of said Col. R. G. Head under policy No. 599,690, consisting of:

57 1. Statement No. 1 of Mary E. Head, beneficiary and assignee.

2. Statement No. 2 by Dr. C. Klippel of Hutchinson, Kansas, the attending physician.

3. Statement No. 3 of P. P. Frieson, all sworn to.

The statement of Mary E. Head being sworn to before Wm. G. Haydon, notary public, to which is attached certificate of the clerk of the probate court of San Miguel County, New Mexico, that William G. Haydon is a duly authorized notary public.

The other statements are all sworn to before S. F. Hutton, a notary public for Reno County, Kansas, and attached thereto is a certificate by the clerk of the district court of Reno County, Kansas, that S. F. Hutton is a notary public within and for said county, duly certified, etc.

We trust that you will find these proofs in proper form.

If anything further is necessary please advise us.

BOTSFORD, DEATHERAGE & YOUNG.

Received the above mentioned papers this July 7, 1906.

P. H. GIDEON, *Cashier*.

Mr. DEATHERAGE: Now on July 14th, 1906, I received a letter from Mr. Gideon, cashier of the New York Life Insurance Company, of that date, requiring proof of death, which letter I now offer in evidence, and which is in words and figures as follows:

KANSAS CITY, MO., 7-14-1906.

Re Policy No. 599,691—R. G. Head, Deceased.

Mess. Botsford, Deatherage & Young, No. 621 New York Life Building, City.

GENTLEMEN: Just received a letter from our Home Office, regarding above policy, in which they state that action is suspended awaiting receipt of guardianship papers, as to the qualifications of
58 Mary E. Head. Kindly therefore furnish certify copy of her appointment.

I enclose you proof of death—statement No. 3, and the company state that same is to be executed by some person not a relative, who saw the remains and knew the insured a considerable length of time.

P. P. Frieson, who executed the original statement No. 3 furnished, stated he did not know the deceased until death. Upon receipt of

these papers properly executed, the company will take pleasure in giving payment of the claim their further consideration.

Yours very truly,

K. C. BRANCH OFFICE.
P. H. GIDEON, *Cashier*.

Ans'd 7-14-06.

B. F. D.

Mr. DEATHERAGE: In compliance with that letter of July 14, I obtained another statement signed by E. Hutton and duly sworn to showing the death of Mr. Head and also certified copy of petition and appointment of Mary E. Head, guardian of Richard G. Head, Jr., minor, which I furnished to the company, and obtained their receipt on July 21, 1906, which I offer in evidence, and which is in words and figures as follows:

JULY 21, 1906.

Received of Botsford, Deatherage & Young, statement No. 3, signed by E. Hutton, showing death of Richard G. Head, sworn to July 20, 1906. Also certified copy of the petition and appointment of Mary E. Head as guardian of Richard G. Head, Jr., a minor.

P. H. GIDEON, *Cashier*.

Mr. DEATHERAGE: On July 23rd, 1906, I received another letter from Mr. Gideon, cashier, in regard to this policy, which is as follows (reads it):

59

7-23-06.

Re Policy No. 599,691—Richard G. Head, Deceased.

Messrs. Botsford, Deatherage & Young, 612 New York Life Building, Kansas City, Mo.

GENTLEMEN: Referring to proofs of death forwarded in connection with death loss under the above numbered policy; our Home Office advises that the policy was duly foreclosed and endorsed for paid-up value on April 4th, 1905, for \$101.00, and that the company's liability is for the paid-up value of \$101.00. They also advise that just as soon as they are in receipt of a certificate showing the appointment and qualification of Mary E. Head as guardian for Richard G. Head, Jr., check will be forwarded for the amount stated.

Yours very truly,

KANSAS CITY BRANCH.
P. H. GIDEON, *Cashier*.

Mr. DEATHERAGE: On Monday the day on which this case was set for trial I asked Mr. Pratt, attorney for the defendant company, if he had the proofs of death and asked him to produce them at the trial; that I thought I had given him notice to make such production, and he said he did not remember of having received such notice; I asked him if he would take what I was saying to him as notice to produce them at the trial, inasmuch as the case was not to be tried

that day, because it did not suit his convenience, and he said that if he had them he would produce them, that he thought he had them among his papers.

Mr. PRATT: No, sir, I never have had them.

Mr. DEATHERAGE: I will get through—I gave notice to Mr. Pratt to produce them, but I have not got any written proof of it.

Mr. PRATT: You do not find any copy of any notice served on me?

Mr. DEATHERAGE: I have not found any copy of any notice served and this case did not come up for trial, and we did give you
60 notice as early as Monday of this week. I have no copy of the statements made out by the witnesses showing proof of death, but as shown by these letters, proof was furnished and no objection made to them, except the one as to statement number three and that I corrected and furnished them and did not expect counsel to object on any ground that the proofs were not sufficient.

Mr. PRATT: I think in our conversation last Monday it was also stated by me I would not object to any evidence you might have in respect to the proof of loss by reason of the evidence being secondary; you might put that in.

Mr. DEATHERAGE: That is true, I think I thought that the proofs of loss were admitted by the answer, and it is a question in my mind now whether they are not admitted by the answer, but in order that there may be no question about it I want to show that we did make proof.

Mr. PRATT: I think we admit the death of Mr. Head in our answer, and while I do not object to any of this evidence Mr. Deatherage has given, on the ground that it is secondary evidence, I do object to the evidence as being incompetent, irrelevant and immaterial and insufficient to show compliance with the terms of this paid-up policy in respect to that requirement, unless supplemented by other proof.

Mr. DEATHERAGE: You offered to pay what you admitted you were liable for, without any additional proof?

Mr. PRATT: That is true; we allege it in our answer.

Mr. DEATHERAGE: I next offer in evidence a letter dated May 20th, 1899, signed by S. B. Wood, cashier, Kansas City Branch Office, and I wish to state that I know Mr. Wood's signature and handwriting, that is that part of it and this is the same letter introduced before in the other case, and which is in words and figures as follows:

61

KANSAS CITY, Mo., 5-20-'99.

Re 599,690 and '1.

Mr. R. G. Head, Watrous, New Mexico.

DEAR SIR: We enclose herewith loan agreements in duplicate under the above policies, which should be signed as indicated in pencil mark, signatures witnessed and all the copies returned to us, together with policies, renewal receipts and the enclosed forms 85 and other papers belonging thereto. There must be placed on one

copy of loan agreements, 25 cents in revenue stamps, that is 25 cents on each original copy, not on the duplicate forms. The company state premiums must be paid to April, 1900, but I believe you paid these premiums when you were here in the office some time ago. If I am mistaken about this write a request for the company to deduct from loan premiums to April, 1900, and request must be signed just as loan agreements are signed.

Yours very truly,

K. C. BRANCH OFFICE.
S. B. WOOD, *Cashier*.

Prem. we find are pd. to April, 1900.

Mr. DEATHERAGE: We offer it for the purpose of showing on the first loan there was no premiums then due.

Mr. PRATT: This letter of 1899 is four years before this second loan was made?

Mr. DEATHERAGE: Yes, sir.

Mr. PRATT: Defendant objects to it as being incompetent, irrelevant and immaterial, as to this transaction.

By the COURT: Objection overruled.

Defendant then and there duly excepting.

Mr. DEATHERAGE: We next offer in evidence a letter of July 29th, 1904, signed by Mr. Kellogg, cashier, and dated at Pueblo, Colorado, which is as follows:

62

PUEBLO, COL., *July 29, 1904.*

Richard G. Head, Las Vegas, N. M.

DEAR SIR: Enclosed herewith please find the company's check No. 9945 on the National City Bank of New York to your order as guardian of Richard G. Head, Jr., for \$328.30 being the net amount of loan available under policy No. 599,691, after deducting \$425, April annual premium \$6.55 grace interest. Also interest in advance to April 3rd, 1905, \$95.35; outstanding loan \$1,100, premium lien note \$310, together with premium note interest \$4.80 making a total of \$1,941.70, leaving the amount of the check as stated above. We also enclose one copy of loan agreements for your files. The renewal receipt will be forwarded upon its receipt from the Home Office.

Yours truly,

M. KELLOGG, *Cashier*.

Mr. DEATHERAGE: This is offered for the purpose of showing the exact amount due on account of premiums at the time that loan was made.

Mr. DEATHERAGE: I next offer in evidence petition of Richard G. Head, Jr., for the appointment of next friend, B. F. Deatherage, and consent of said B. F. Deatherage to act as such next friend and his bond or agreement to be responsible for the costs and affidavit attached thereto and order appointing B. F. Deatherage as next friend, and all done on the 20th day of September, 1906.

I will state this, this appointment was prior to the filing of the original petition in this case.

Mr. PRATT: I object to that statement, the appointment itself should show.

Mr. DEATHERAGE: It shows it was done on the 20th day of September, and the petition was filed the 20th day of September, I remember that as a fact, I filed this petition, I first had the
63 order made appointing me as next friend before filing the petition and then affidavit attached to the petition filled in.

Which said petition and appointment are in words and figures as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City,
October Term, 1906.

Petition for the Appointment of a Next Friend.

Comes now Richard G. Head, Jr., and shows to the court that he is an infant over the age of fourteen (14) years and under the age of twenty-one (21) years; that he desires to institute a suit in the circuit court of Jackson County, Missouri, at Kansas City, against the New York Life Insurance Company, to recover the sum of ten thousand dollars (\$10,000.00) less such sum as may be owing to said company by the father of the petitioner, upon whose life a policy of insurance was issued by said insurance company, payable to your petitioner; that he has been advised by counsel learned in the law that he has a just and meritorious cause of action against the said company; that he has no legally appointed guardian in the state of Missouri, and he therefore prays that B. F. Deatherage, may be appointed as his next friend for the purpose of instituting said suit, the said B. F. Deatherage having consented to act as such next friend.

Dated this — day of September, 1906.

RICHARD G. HEAD, JR.

Witness:

MARY E. HEAD.

I, B. F. Deatherage, named in the petition above, consent and am willing to serve as the next friend of the above named petitioner, Richard G. Head, Jr., for the purpose of instituting suit against said New York Life Insurance Company, in his behalf, and agree to be responsible for the costs of said suit.

B. F. DEATHERAGE.

STATE OF MISSOURI,
County of Jackson, ss:

On this 20th day of September, 1906, before me personally appeared B. F. Deatherage, to me known to be the person described in and who signed the foregoing instrument and
64 acknowledged that he executed the above written consent to serve as the next friend of Richard G. Head, Jr., an infant, in his

suit to be instituted against the New York Life Insurance Company, in the circuit court of Jackson county, Missouri.

[SEAL.]

H. G. HENLY, *Clerk*,
By D. M. McCLANNAHAN, *D. C.*

In the Circuit Court of Jackson County, Missouri, at Kansas City,
October Term, 1906.

RICHARD G. HEAD, Plaintiff,

v.

NEW YORK LIFE INSURANCE COMPANY, Defendant.

Order Appointing Next Friend.

The petition of the above named Richard G. Head, Jr., for the appointment of B. F. Deatherage as his next friend, for the purpose of instituting a suit against the New York Life Insurance Company upon a policy of insurance issued by said company upon the life of Richard G. Head, Sr., the father of said Richard G. Head, Jr., payable to the said Richard G. Head, Jr., and the written consent of B. F. Deatherage to serve as such next friend and the bond of said B. F. Deatherage as such, being presented to and approved by the clerk of this court, said B. F. Deatherage is hereby appointed as next friend of said Richard G. Head, Jr., to institute and prosecute said suit against the New York Life Insurance Company.

H. G. HENLY, *Clerk*,
By D. M. McCLANNAHAN, *D. C.*

[SEAL.]

MARY E. HEAD, sworn, testified on behalf of plaintiff as follows on

Direct examination by Mr. DEATHERAGE:

Q. You are Mary E. Head?

A. Yes, sir.

Q. You are of age?

A. Yes, sir.

65 Q. Is Richard G. Head, Jr., your brother?

A. Yes, sir.

Q. How old is he?

A. He was 16 years old the 16th of last November.

Q. He was 16 years old the 16th of last Nov., 1907?

A. Yes, sir.

Q. Is he the Richard G. Head, Jr., named in this policy 599,691?

A. Yes, sir.

Q. And Richard G. Head, was your father?

A. Yes, sir.

Q. When did your father die?

A. April 8, 1906.

Q. At what place?

A. Hutchinson, Kansas.

Q. Did you see his remains?

A. Yes, sir, I did.

Q. You were not present at the time of his death?

A. No, sir.

Q. The amount of this policy has not been paid?

A. No, sir.

Mr. DEATHERAGE: I do not know whether I proved the allegation by you or not.

Mr. PRATT: It sufficiently appears in the other case you did not receive it.

Mr. DEATHERAGE: What business was your father engaged in?

A. He had been a cattle man all his life.

Q. Did he frequently in the course of his business come to Kansas City, Missouri?

A. Yes, sir, he did, he was here two-thirds of the time.

Q. That was during the year 1894?

A. Yes, sir, it was.

Cross-examination by Mr. PRATT:

Q. When did you get this policy 599,691, upon which you, as guardian for your brother *instructed* suit, this policy 599,691 in issue in this controversy, where did you get it?

A. I suppose I got that with the rest of the papers in the box.

Q. That is it was in among your father's papers at the time of his death?

A. I do not remember that, I remember a great number of papers there in the box, I could not tell whether this one was there or not.

66 Q. That paper was found among your father's papers at his death?

A. It was in the box. If that was with the papers it was in the box.

Q. You do not know where it came from?

A. No, sir, I am not positive.

Mr. DEATHERAGE: Pardon me, if I will show that letter that will explain the policy. (Hands letter to witness.)

WITNESS: Then I must have opened that letter after father's death.

Mr. PRATT: You mean a letter about this policy?

A. Yes, sir.

Q. Now Richard G. Head, Senior, was your brother's guardian during your father's life time?

A. Yes, sir.

Q. Do you know this fact that there was a loan on this policy during your father's life time, this policy in controversy?

A. I believe there was.

Q. You understood all about that didn't you?

A. I tried to understand it but never could, it was too much for me.

Q. Did you understand your father made a loan on your brother's policy at the same time the loan was made on this, did you understand that?

A. Well, I knew there was something of the kind.

Q. You thought there was?

A. Yes, sir—I should hate to commit myself.

Q. Where did your father live; that is, where was his residence during his life time, and during your life time, Miss Head?

A. We lived a great many places.

Q. From 1894 on?

A. In New Mexico.

Q. Did your father have any office in Kansas City, any business up here, in Kansas City?

A. He did not have an office here of his own, no.

Q. He simply came up here with stock from his ranch down in New Mexico?

A. Yes, sir.

Q. And he sold the cattle here and would go back again, and go out and buy other stock and that was the end of his business?

A. He was a stockholder in the Drumm Commission Company and one of the organizers.

67 Q. The Drumm Company did business at the stock yards?

A. It was Drumm-Flato at that time.

Q. They did business at the stock yards?

A. Yes, sir.

Q. And all of that time his residence and his family were in New Mexico?

A. My sister and I were away at school most of that time about the time that this insurance was taken out but my mother and brother were in New Mexico.

Q. Did you say where you were at school?

A. Here in Missouri.

Q. You were tendered, were you not the sum of one hundred and one (\$101) dollars in full for this policy?

A. After my father's death I believe that was the sum, it was near that anyway.

Q. As far as you know that is correct, it was \$101, whatever the amount of a paid-up policy was?

A. Whatever you considered the amount.

Mr. PRATT: I have an affidavit showing. Just let the record show, it is admitted that defendant tendered the plaintiff Mary E. Head \$101.00 as the guardian of Richard G. Head, Jr., \$101 being the full amount of a paid-up policy as understood by the defendant.

By Mr. DEATHERAGE: The letter referred to when Mr. Pratt was examining you, is the one dated April 18th, 1906?

A. Yes, sir.

Q. The letter which I now hand you?

A. Yes, sir.

Mr. DEATHERAGE: I offer it in evidence, which is as follows to-wit:

ALBUQUERQUE, N. M., April 18, 1906.

Mr. Richard G. Head, Las Vegas, N. M.

DEAR SIR: I am enclosing herewith your policy No. 599691

which has been closed out as per the terms of the loan agreement. I also enclose check \$56.25 refund of policy loan interest unearned.

Very truly yours,

JOHN F. DOOLEY, *Cashier.*

65 (By Mr. DEATHERAGE:)

Q. What was done with the check \$56.25 enclosed in that letter?

A. It seems to me that I mailed it to you (Deatherage) to return to the company.

Mr. DEATHERAGE: And right in that connection, Mr. Pratt, it may be taken as a sworn statement by me, I returned the check to the company; the memorandum which I made on this letter, check returned to the company at New York, June 11th, 1906, upon the ground that we claimed it was not sufficient, we claimed the full amount of the insurance, less the actual indebtedness to the company.

(By Mr. DEATHERAGE:)

Q. That letter and check and that policy were all received after the death of your father?

A. (Witness:) Yes, sir.

Q. You had no knowledge, or had the company as far as you knew foreclosed the loan or marked the policy as a paid-up policy prior to his death?

A. No, sir.

Q. I state as far as you knew?

A. No, sir.

Q. Now this check of \$56.25 was interest your father had paid on the loan up to April 3, 1903, was it not?

A. Yes, sir.

Q. And he also paid \$107 part of the premium for the year 1905 up to April 3, 1906?

Mr. PRATT: What is that question now—I object to it.

Mr. DEATHERAGE: I have the receipt here I wish to introduce it; I think it is proven by the admission of Mr. Anderson; I offer it in evidence; the receipt of the company May 4th, 1905, which is in words and figures as follows:

New York Life Insurance Company,
346 & 348 Broadway, New York.

ALBUQUERQUE, N. M., May 4, 1905.

Received from Richard G. Head, Las Vegas, N. M., \$107.00 in cash and a note for \$318 dated the third day of April, 1905, due on or before six months after its date without grace and without demand or notice payable at First National Bank in the city of Albuquerque in the state of New Mexico.

69 Said note is received by the New York Life Insurance Company at the request of the maker and is held by said com-

pany together with said cash on the following express agreement, which forms a part of said note:

"That although no part of the premium due on the third day of April, 1905, under policy No. 599,691 issued by said company on the life of Richard G. Head has been paid the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due such payment, together with said cash will then be accepted by said company as payment of said premium and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted and all rights under said policy shall be the same as if said cash had not been paid or this agreement made; that said company has duly given every notice required by its rules or by the laws of any state in respect to said premium and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive and does hereby waive every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement, if any notice of any kind were required as a condition to the full enforcement of all its terms."

GEO. R. TRYNER, *Cashier.*

JOSEPH B. REYNOLDS, sworn, testified on behalf of the plaintiff, as follows, on

Direct examination by Mr. DEATHERAGE:

Q. Please state your name?

A. Jos. B. Reynolds.

Q. Where do you live?

A. Kansas City, Mo.

70 Q. What is your occupation and business?

A. President of the Kansas City Life Insurance Company.

Q. How long have you been president of that company?

A. Since August 1st, 1904.

Q. What was your occupation prior to that time?

A. I was Actuary of the Missouri State Insurance Department.

Q. And had your office in Jefferson City?

A. Yes, sir.

Q. Prior to that time were you engaged in any insurance business?

A. Yes, sir, for about two years.

Q. As Actuary of the Insurance Department of the State of Missouri what were your duties; what were you called on to do and what experience did you acquire?

A. Quite a diversity of duties in the office there examining annual statements of the companies, and passing on applications and other papers submitted in connection with applications for licenses on the

life companies, and value of policies frequently under the terms and reservations on various policies and determining values.

Q. Determining cash value of policies?

A. Yes, sir, and paid-up values and extended insurance values.

Q. And as president of the Kansas City Life Insurance Company you have also continued your experience as an Actuary have you?

A. Yes, sir, part of the time it has been devoted to that.

Q. Now look at policy number 599,691 issued by the New York Life Insurance Company to Richard G. Head, whose age at the time of issue was 47 years, and state what was the net value of this policy on April 3, 1905, based on the American Experience Table of Mortality, with interest at the rate of four per cent per annum.

Mr. PRATT: Does the policy call for four and a half per cent? I have no objection to the witness showing the value of the policy by the terms of the policy itself, and if you are asking to have the policy determined by any other method, I have an objection to introduce in this case, to that evidence.

71 Mr. DEATHERAGE: Add to that question under section 5856 of the revised statutes of the state of Missouri, 1889.

Mr. PRATT: Now that question is objected to for the reason that it calls for the valuation of the policy not in accordance with the contract of the parties and to give the statute referred to an application such as I understand the plaintiff has contended for here, would be in contravention of and contrary to the fourteenth amendment of the Constitution of the United States and also article 1, section 10, of the Constitution of the United States; that it is also contrary to and in contravention of section 30, of article two of the state constitution and section 15, article 2, of the state constitution.

By the COURT: The objection is overruled.

The defendant then and there duly excepting.

By the WITNESS: The net value of the policy on April 3rd, 1905, based on the American Experience Table of Mortality is \$2,209.30.

Q. What was three-fourths of that value?

A. \$1,656.97.

Q. Assuming there was an indebtedness due to the company, for premiums with interest due to the company, \$841.70 at that time, how much would be left, after deducting said premium indebtedness with interest from three-fourths of the net value?

A. \$815.27.

Q. Now applying that \$815.27 as a single premium at the attained age for temporary extended insurance. I mean at the attained age of Mr. Head on April 3rd, 1905, his age being given under the policy in 1894 as 47, how long after April 3rd, 1905, would this \$815.27 maintain the policy in force at its full amount?

Mr. PRATT: In order to preserve the record I object to the question as calling for the valuation of the policy contrary to the terms of the policy itself and within the constitutional prohibitions and limitations referred to in my former objection.

By the COURT: Objection overruled; defendant then and there duly excepting.

72 A. That is the same question which was asked awhile ago, and I said it would require a computation to do that; it would maintain it in force approximately three years and a half, to give the exact figures it would be necessary to have the mortality table.

Q. Will you kindly get the mortality table and figure it up and hand it to me or counsel for the defendant, the answer, giving the correct number of dates that may be agreed on?

A. I will hand it in.

Q. You figured it heretofore on the basis of the indebtedness of \$746.35?

A. Yes, sir.

Q. Deducting that amount it left \$910.12, it would extend it for four years I believe and one month?

A. Yes, sir.

Q. Now Mr. Reynolds, under section 5857 of the revised statutes of Missouri, 1889, what would be the net value of this policy which we have just referred to—withdraw that.

If one-fourth of the premium in this policy which became due on April 5, 1905, was paid, that one-fourth being \$107 would that make any difference in the amount the time to which the extended insurance would apply?

A. It has never been customary among officers of the company; only until last winter has any state passed a law compelling companies to give values based on semi-annual or quarterly premiums; heretofore, they have always been based on the value of the annual premiums; some companies have made it a practice to allow credit where semi-annual has been paid.

Cross-examination by Mr. PRATT:

Q. These valuations which you have given on this last policy were based entirely on your construction of the Missouri statutes and not on the policy itself?

A. Not on the construction of the Missouri statute, the valuation based on the American Experience Table of Mortality and four and one-half per cent interest.

Q. And by virtue of the Missouri statutes, as you construe them, you arrive at this valuation you have given us, not by anything contained in the policy?

A. The policy does not have any provision for any value in it, refers to no table of mortality or assumed rate of interest.

73 By Mr. DEATHERAGE: The plaintiff rests.

By Mr. PRATT: Let the record show the defendant files its demurrer to the plaintiff's evidence, on the ground that the same does not prove a cause of action in favor of the plaintiff and against this defendant, and asks the court for a declaration of law in favor of the defendant and against the plaintiff, for judgment, upon the showing thus made.

By the COURT: The demurrer is overruled and the request will be refused.

To which action, ruling and decision of the court in overruling

the demurrer and refusing to give said declaration of law as above requested, the defendant then and there duly excepted.

And thereupon the defendant in order to maintain the issues upon its part, offered and introduced evidence as follows:

Mr. PRATT: The defendant offers in evidence the depositions of James H. McIntosh, and Arthur P. Grow, and Ben T. Wilcox, with the exhibits attached thereto, and reads the same, which are in words and figures as follows:

JAMES H. MCINTOSH, of lawful age, being duly sworn and examined on the part of the defendant, deposeeth and saith.

Direct examination by Mr. MCINTOSH:

Q. Please state your name, age, place of residence and occupation.

A. My name is James H. McIntosh; age forty-eight; I reside in New York State, and by occupation I am an attorney and counselor at law.

Q. What position if any do you hold in the defendant's employ?

A. I am general counsel of the defendant.

Q. How long have you been a practicing lawyer?

A. For more than twenty years.

74 Q. To what extent have you devoted yourself to the practice of law during that time?

A. I have applied myself solely to the practice of the law in court and out.

Q. You are a member of the New York bar?

A. I am.

Q. Are you familiar with the New York Insurance Law? If so, to what extent, and how have you acquired your familiarity?

A. I think I am pretty familiar with New York Insurance law. For more than four years I have given my time exclusively to the legal business of the New York Life Insurance Company and during that time my work has had special reference to New York insurance law as well as insurance law generally.

Q. You may state what the book is which you now hold in your hand.

A. The book which I hold in my hand is the laws of New York, 115th Session, 1892, volume 2.

The defendant offers in evidence that part of the book referred to by the witness contained on the front pages thereof, purporting to be the certificate of the Secretary of State, and asks that a full, true and correct copy thereof be attached to and made a part of this deposition, identified as "McIntosh's Exhibit A."

Q. You may state what use, if any, is made of the volume which you have identified and hold in your hand, in the courts of this state.

A. This volume is used in the courts of this state, and treated by the courts as an authentic, full, true and correct publication of the laws which it purports to contain.

The defendant now offers in evidence that part of said volume commencing on page 1869 chapter 690, section 88 with the words, "Surrender value of lapsed or forfeited policies" and concluding with the words "face of the policy when issued" and asks that a full, true and correct copy of said section be attached to, made a part of and returned with this deposition as "McIntosh's Exhibit B."

Q. You may state whether or not at any time during the year 1894, or at any time since said date, there has been any law in the state of New York with respect to the surrender value of lapsed or forfeited policies, except section 88 of chapter 690 which you have put in evidence.

A. There has not.

Q. You may state whether or not at any time during the year 1894, or since said date, there has been any law in the state of New York the same as sections 5856, 5857, 5858, or 5859 of the revised statutes of Missouri, 1899.

A. There has not.

Q. Has there been any law in New York State during any part of said time similar to said sections of said revised statutes of Missouri?

A. No, there has not been except in so far as section 88 of chapter 690 of the laws of New York, 1892, are similar thereto.

Cross-examination by Mr. BOTSFORD:

Q. Mr. McIntosh, you have given this testimony as to the law of New York on the assumption that the contracts in these cases were New York and not Missouri contracts. I suppose there is no doubt about that is there?

A. I have given this testimony in answer to the questions that were asked me, for the purpose of showing what the law of New York was and is in the respects indicated by the law.

Q. The controversy in this case, Mr. McIntosh, is whether these contracts were New York contracts, governable by the laws of New York to which you have testified, or governable by the laws of Missouri, about which you have also testified, is it not?

A. The controversy in this case is a controversy that is shown by the pleadings.

Q. You being the general counsel of the company, can you not say in a word whether that is the chief controversy or not that I have pointed out?

A. I do not think my opinion on that subject would be binding on anybody. The court and the parties, I take it, will be bound by the issues that are made by the pleadings.

Q. You do not claim that if these contracts were Missouri contracts that the New York laws govern them, do you?

A. I do not know what my claim as a witness can have to do with the facts in the case, but if you wish me to answer, I will say that the parties in the contract themselves agreed that the contract, including the application which is a part of the contract, should be construed according to the laws of the state of New York, and they also agreed that the place of the contract should be the home office of the company in the city of New York.

Q. If, however, the court should hold that the contracts of these parties were Missouri contracts, would you then claim that they were governable by the laws of Missouri, to which you have referred, or the laws of New York?

A. It is hard to see how a court could hold that the parties could not agree between themselves as to the laws of what state their contracts should be governed by, and this specially where the parties, one resides in a territory and the other resided in the state in respect of whose laws they agreed their contract should be controlled by.

(Signed)

JAMES H. McINTOSH.

McINTOSH'S EXHIBIT "A."

Certificate.

Office of the Secretary of State of the State of New York.

ALBANY, Aug. 1, 1892.

Pursuant to the directions of the act entitled, "An act relative to the publication of the laws," passed April 12, 1843, I hereby certify that the following volume of the laws of this state, was printed under my direction.

FRANK RICE,
Secretary of State.

McINTOSH'S EXHIBIT "B."

SEC. 88. Surrender Value of Lapsed or Forfeited Policies.—Whenever any policy of life insurance issued after January 1, 1880, by any domestic life insurance corporation, after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mortality at the rate of four and one-half per cent — annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid up insurance payable at the same time and under the same conditions, except as to payments of premiums, as to the original policy. If no such agreement be expressed in the application or policy such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy.

The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American experience table of mortality with interest at the rate of four and one-half per cent per annum after deducting any indebtedness of the insured on account of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy evidence of which is acknowledged by the insured in writing.

The net value of the insurance given for such single premium under this section, computed by the standard of this state shall in no case be less than two-thirds of the entire reserve computed according to the rule prescribed in this section after deducting the indebtedness as specified, but such insurance shall not participate in the profits of the corporation.

78 If the reserve upon any endowment policy applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term on the conditions on which the original policy was issued.

This section shall not apply to any case where the provisions of the section are specifically waived in the application and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued.

ARTHUR R. GROW, of lawful age, being duly sworn and examined on the part of the defendant, deposeth and saith:

Direct examination by Mr. DEATHERAGE:

Q. Please state your name, age, place of residence and occupation.

A. My name is Arthur R. Grow, age 49; I reside in East Orange, New Jersey, and my occupation is Actuary of the New York Life Insurance Company, defendant.

Q. How long have you been actuary of the defendant?

A. Several years.

Q. How long have you been employed in the Actuary's department of the defendant?

A. More than twenty years.

Q. Are you familiar with actuarial science and actuarial work generally?

A. Yes.

Q. You may state whether or not your department reckoned the value in paid-up insurance of the policy in controversy in this suit?

A. Yes.

Q. When was that reckoning made, if you know?

A. March 23, 1906.

Q. You may state fully the figures used in that mathematical transaction.

A. We first ascertained that the reserve on the policy was \$2,349.60; the indebtedness on the policy was \$2,270; the difference

between those two amounts is \$79.60, which divided by \$795.16 produced a fraction over \$100. In accordance with the company's rule to give the next highest dollar paid-up insurance, the amount of paid-up insurance was \$101.

Q. Did you make the calculations you have just given in your last answer pursuant to any law of the state of New York, if so what law?

A. Yes, pursuant to section 88 chapter 690, laws 1892, state of New York.

Q. What was the reserve used in the calculation which you have just described?

A. The reserve mentioned in section 88 chapter 690 namely, the American Experience Table of Mortality at the rate of $4\frac{1}{2}$ per cent per annum.

Q. What was the divisor you used in ascertaining the paid-up value?

A. The divisor was the single premium of life insurance at the published rates of the corporation at the time the policy was issued, taken at the age of the insured at the time of lapse or forfeiture.

Q. And how much paid-up insurance did the remainder, so obtained, purchase?

A. \$101.

Cross-examination by Mr. BOTSFORD:

Q. Mr. Grow, you spoke of a deduction here in this computation of \$2,270, what was that for?

A. A loan made to the insured.

Q. No part of that was due the company from Mr. Head for premiums?

A. No.

Q. It was all due for a loan, was it?

A. Yes.

Q. This computation was made entirely under the New York law, as I understand it?

A. Yes.

Q. If that loan had never existed and had not been taken account of by you in that computation, what would have been the condition of this policy at the time you made this computation?

A. Do you mean to say if the premium was not paid?

Q. No, I mean if that loan had not been made and had not been considered.

A. The owner of the policy would have been entitled to extended insurance or paid-up insurance in accordance with the non-forfeiture provisions set forth in full on the second page of the policy.

Q. You are not able to state, I suppose, as you said in the other case, what effect upon the transactions in connection with this policy the laws of Missouri would have had, if the laws of Missouri instead of the laws of New York governed the transaction?

A. No, I am not.

Redirect examination by Mr. McINTOSH:

Q. When in answer to questions on cross examination you stated that there was no part of the loan which you deducted from the reserve that had been used in paying premiums did you or not in answering have any reference as to whether or not Mr. Head had used the money borrowed from the company, and on account of which you made the deduction, to pay premiums on the policy?

A. I do not know what he did with the money that he borrowed.

Q. As a matter of fact, if, at the time Mr. Head borrowed that money he had formerly given the company notes for premiums, would those notes have been deducted from the amount of the loan and the cash difference only be paid to Mr. Head?

A. That would be in accordance with the rules of the company.

Q. So that whether that \$2,270 represented premiums that Mr. Head had paid with borrowed money from the company you do not know?

A. I do not know.

(Signed)

ARTHUR R. GROW.

BENJAMIN T. WILCOX, of lawful age, being duly sworn and examined on the part of the defendant, deposes and saith as follows:

Direct examination by Mr. McINTOSH:

Q. Please state your name, age, place of residence and occupation.

A. My name is Benjamin T. Wilcox; age fifty-two; I reside in Montclair, New Jersey, and my occupation I am manager of the division of policy issues of the New York Life Insurance Company, defendant.

Q. How long have you been manager of the division of policy issues of the defendant?

A. About nine years.

81 Q. How long have you been employed in the defendant's division of policy issue?

A. Very nearly thirty-five years.

Q. Are you familiar with all the details of that department?

A. Yes.

Q. What, in a general way, is the character of the work done by your department?

A. The issuing of policies, the changing of policies, from one plan to another, and the endorsing of paid-up policies.

Q. Do you mean by your last answer the endorsing of policies for paid-up insurance?

A. Yes.

Q. In endorsing policies for their value in paid-up insurance, what is, and has been, the rule and practice of your division in respect to the date of the endorsement, that is, is it the rule and practice to date the endorsement on the policy the very day the endorsement is made?

A. Yes.

Q. Is there, or has there ever been, any variation from this rule?

A. Not that I know of.

Q. If there were any, would you know of it?

A. I think I would.

Q. Do you, and has it been your practice in your department to make any record of the date that an endorsement is made on a policy, with the numbers of the policies showing the policies endorsed for paid-up insurance on that date?

A. Such record is kept.

Q. Will you produce such record with respect to endorsement on policy No. 599,691, in controversy in this suit, for paid-up insurance?

A. I will; I have produced the record.

Q. When are the entries in the book which you have produced and have before you, made with reference to the date when the endorsement is made on the policy?

A. They are made the same day that the policy is endorsed for its paid-up value.

Q. Were the entries in the book which you have produced made under your supervision?

A. They were.

Q. Do you or not know them to be correct?

A. I know them to be correct.

Q. Are they correct?

A. They are.

82 Q. Are they or not made in the regular course of the business of your department?

A. They are made in the regular course of the business of the department.

Q. Is the book you have produced one of the company's regular records?

A. It is.

Q. And that record showing the things which you have stated the book was kept for?

A. Yes.

Q. Are you able by consulting this record to state the date on which the endorsement was made on policy No. 599,691 for its paid-up value?

A. I am.

Q. You may state the date.

A. April 4, 1906.

Q. Where does the date in the book which you have produced of the endorsement of the policy in question as paid-up appear?

A. In the company's record of changes, No. 4 division of policy issues, on page 188.

The defendant here offers in evidence the pages identified by the witness as pages 188 and 189 in record of changes No. 4, division of policy issues, and asks that a full, true and correct and certified copy thereof be attached to and made a part of and returned with this deposition, marked as Wilcox's Exhibit "A."

(Signed)

BENJAMIN T. WILCOX.

WILCOX EXHIBIT A.

March 31, 1906.

31919 3158573

20 3179940

21 3177208

22 3079524

23 3179625

24 3179990

25 3178225

26 3177389

27 3178794

28 3178711

29 3153420

30 3074470

31 3066824

32 3091492

33 3025983

34 3064912

35 3071709

36 3073050

37 3073051

38 3073982

39 3074370

40 3075840

41 3156794

42 3179449

Apr. 2, 1906.

43 600178

44 3125629

45 3546849

46 3341369

47 3463394

48 3306270

49 3182679

50 3308277

51 3180885

52 3189875

53 3183197

54 594148

55 3180395

56 3180168

57 3309152

58 3279443

59 3239623

60 3237726

61 3253208

62 3305734

63 3247667

64 3194599

65 3201127

66 3301852

April 2, 1906.

67 3312525

68 3179690

31939 3185802

70 979499

71 396305

72 396304

73 3028471

74 3185458

75 3306612

76 3186898

77 3308207

78 3185405

79 3335186

80 3276486

81 3185805

82 3308006

83 3184702

84 3184573

85 3078259

Apr. 3, 1906.

86 3175712

87 3292909

88 3314233

89 3181523

90 872081

91 887444

92 812285

93 807249

94 625571

95 3118247

96 2081824

97 2082470

98 2079991

99 2046437

32000 2080955

1 2074160

2 2080847

3 2080261

4 2079393

5 3179504

6 2050839

7 2080364

8 2018855

9 202575

10 3245082

11 3118103

12 3382172

13 3316856

14 3075252

	15	3075253		65	853178
	16	3184427		66	931305
	17	3076405		67	889398
	18	3318297		68	889536
April 3, 1906.			April 4, 1906.		
	32019	3188322		32069	817026
	20	3076380		70	888763
	21	3184042		71	824830
	22	3077653		72	816829
	23	3075579		73	745952
	24	3075925		74	3245537
	25	3313508		75	3245538
	26	3072929		76	3245536
	27	3076543		77	887966
Apr. 4, 1906.	28	3068087		78	891096
	29	3181333		79	621323
	30	3182286		80	890987
	31	3078458		81	869478
84	32	3074120		82	891872
	33	3311477		83	890015
	34	3282357		84	837428
	35	909880		85	2096952
	36	3180195		86	773819
	37	3314681		87	747331
	38	3035901		88	747230
	39	3188424		89	868335
	40	3032296		90	775480
	41	3328218	Apr. 5, 1906	91	888547
	42	3558456		92	891566
	43	3238997		93	892591
	44	3554112		94	746784
	45	3325289		95	749480
	46	2064170		96	3076193
	47	3092377		97	2067830
	48	3228260		98	893122
	49	3523090		99	3075739
	50	885652		32100	3079789
	51	3015527		1	3079544
	52	3376792		2	3053231
	53	855969		3	3075228
	54	3479124		4	3059645
	55	851396		5	3077841
	56	815383		6	3078192
	57	599691		7	587659
	58	3118708		8	827064
	59	3176793		9	3081690
	60	3330683		10	3069919
	61	406074		11	3139076
	62	3315601		12	3013316
	63	813385		13	3021426
	64	817429		14	3021425

85	15	3021424	67	3166369
	16	878067	68	3170590
	17	3184074	April 6, 1906.	
	18	880263	32169	3307304
April 5, 1906.	32119	3174675	70	3308698
	20	3117925	71	3300612
	21	3346266	72	3298158
	22	3326148	73	3297823
	23	3324931	74	3295529
	24	3320599	75	3272831
	25	3318165	76	3254403
	26	3315080	77	2084847
	27	3314398	78	3186305
	28	3185657	79	3073864
	29	3183150	80	3312791
	30	3078028	81	818403
	31	3076371	82	804938
	32	2119222	83	817370
	33	3333859	84	3174081
	34	3310652	85	3171105
	35	3310217	86	3372428
	36	3310535	87	889388
	37	3302054	88	3186244
	38	3311923	89	3186227
	39	3311838	90	3185987
	40	892028	91	3185526
	41	813362	92	3185220
	42	3286071	93	3184729
	43	3322801	94	3184544
	44	3322802	95	3183229
	45	3312286	96	3174686
	46	3311357	97	972539
	47	3309628	98	3315678
	48	3325410	99	3310427
Apr. 6, 1906	49	3314977	32200	3315541
	50	3313254	1	3127050
	51	3314166	2	3072623
	52	3313884	3	2082211
	53	3312786	4	3078436
	54	3343252	5	3075291
	55	3359565	6	3179301
	56	2118296	7	3310212
	57	3314237	8	757099
	58	3313350	9	633298
	59	3314568	10	3077285
	60	3312367	11	3310885
	61	3312851	12	887317
	62	3086928	13	634954
	63	3065616	14	3309944
	64	3170022	15	3315562
	65	3059690	16	3312540
	66	3065648	17	3315587
			18	3314719

86

Apr. 7, 1906

Mr. PRATT: We offer in evidence a certified copy of the records of the probate court of Mora County, New Mexico, showing the authority of Richard G. Head to make this loan for his son, or as guardian for his son, and to execute any note in connection therewith, or any agreement which might be necessary in connection therewith; this is not certified in accordance with the laws of the United States, but I called Mr. Botsford's attention to it before the trial and he said he would raise no point on that, it would be admitted.

Mr. DEATHERAGE: There is no question raised on it.

Which said records as so read are in words and figures as follows:

Probate Court Record.

Mora County, New Mexico.

MORA, May 1st, 1899.

Now comes John Mark, agent for R. G. Head and presents the following petition, to-wit:

Your petitioner R. G. Head, a citizen of the town of Watrous, County of Mora and territory of New Mexico, in substance asks your honorable court, that he be appointed guardian of Richard G. Head, Jr., age seven years for the purpose and object of a loan of \$2,200.00 in behalf of said minor, upon two certain life insurance policies issued by the New York Insurance Company upon the life of your
petitioner for ten thousand dollars each numbered respectively 599,690 and 599,691, the said Richard G. Head, Jr.,
87 being the beneficiary. The said minor not having other property of account except on these policies and the same is approved and the bond fixed at \$4,400.00 with John Mark and Mrs. Martha J. Head, as sureties and the court gives the following order and decree:

In the Matter of the Estate of RICHARD G. HEAD, JR., Minor.

It appearing to the court that the said minor Richard G. Head, Jr., has no property except his interests as beneficiary in two (2) certain life insurance policies numbered 599,690-1, issued by the New York Life Insurance Company, upon the life of Richard G. Head, and that it is necessary that said Richard G. Head, who has heretofore been appointed guardian of said child, borrow upon said policies the sum of twenty-two hundred (\$2,200.00) dollars to be used for the benefit of said minor child, and that the said sum of money can be so borrowed from the New York Life Insurance Company by pledging said policies as collateral therefor.

It is therefore, ordered, adjudged and decreed by the court, that said Richard G. Head, as guardian of said minor child be and is hereby authorized and empowered to borrow from the New York Life Insurance Company, the sum of twenty-two hundred (\$2,200.00) dollars upon such terms and conditions as he can obtain

the same, and to pay interest for said sum at a rate not exceeding 5% per annum, and that as security for such loan that he pledge said insurance policies to the New York Life Insurance Company, in such manner as may be required by said Company.

Done in open court this 1st day of May, A. D. 1899.

IGNACIO PACHECO,
Probate Judge.

Attest:

TITO MELENDEZ, *Clerk*,
By PEDRO A. ORTEGA, *Deputy*.

88 TERRITORY OF NEW MEXICO,
County of Mora, ss:

In the Probate Court.

To All To Whom These Presents Shall Come, Greeting:

Be it known that at the regular May Term, 1899, of the probate court of the county of Mora, in the territory of New Mexico, begun and held at the probate court of the county of Mora, in the territory of New Mexico, begun and held at the probate court room in the court house in the town of Mora within said county before the Honorable Ignacio Pacheco, probate judge of said county holding said court on the 1st of May, A. D. 1899, and sitting as a court of probate and for the appointment of guardian; application having been made in due form therefor, the said court did appoint Richard G. Head of said county guardian to Richard G. Head, Jr., aged seven years and did order said guardian to give bond as required by law in the sum of forty four hundred dollars with John Mark and Martha J. Head sureties for the faithful discharge of his duty as such guardian. And the said Richard G. Head, having entered into bonds agreeably to the order aforesaid (which were duly approved by said court), and filed the same in the office of the clerk of said court according to law, and having also taken, subscribed and filed in the office of the clerk of said court, the oath prescribed by law, he the said Richard G. Head, is duly constituted guardian to the person and estate of the said minor and is by these presents authorized and empowered to have the care and guardianship of the person of said ward and the possession and management of his estate both real and personal and of the profits arising therefrom for the use and benefit of said ward with authority to receive and as guardian to sue for all debts, rents, accounts and property, real and personal, due and belonging to said ward and under the order and direction of said court to sell the personal property of said ward and to lease, rent and by license and order of the court sell the real property of said ward according to the provisions of the estate in such case made and provided.

89 In Testimony Whereof, I Tito Melendez, clerk of said court have hereunto set my hand and affixed the seal of said court at Mora in the said county of Mora, this 1st day of May, A. D. 1899.

TITO MELENDEZ,
Clerk of the Probate Court.

TERRITORY OF — MEXICO,
County of Mora, ss:

I, Tito Melendez, clerk of the probate court do hereby certify that the foregoing letters of guardianship have by me been duly recorded in book of letters of guardianship, page 264, kept in this office for such purpose.

TITO MELENDEZ,
Clerk of the Probate Court,
By PEDRO A. ORTEGA, Deputy.

Guardian's Bond and Oath.

Know All Men By These Presents, That we, Richard G. Head as principal and John Mark and Martha J. Head, are held and firmly bound unto the territory of New Mexico, for the use of Richard G. Head, Jr., in the sum of four thousand four hundred dollars, lawful money of the United States of America, to be paid to the said Richard G. Head, executors, administrators or assigns to which payment well and truly to be made we hereby jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

In Witness Whereof, we have hereunto set our respective hands and seals this 2nd day of May, A. D. 1899.

The condition of this obligation is such that whereas the said Richard G. Head was on the 1st day of May, A. D. 1899, appointed by the court of probate of the county of Mora, Territory of New Mexico, guardian of Richard G. Head, Jr., minor under the age of twenty-one years. Now, if the said Richard G. Head, shall duly render according to law, just and true accounts of his guardianship and if the said Richard G. Head, executors or administrators or any guardian who may be appointed to the said Richard G. Head,

90 Jr., after the determination of ceasing of the guardianship of the said Richard G. Head, Jr., give an account of all the money, property and effects belonging to Richard G. Head, Jr., in the possession or under the control of said Richard G. Head, and that shall be due to Richard G. Head, Jr., from the said Richard G. Head, and if the said Richard G. Head shall in all things faithfully perform and fulfill his duty as guardian aforesaid, then this obligation shall be void and of none effect; otherwise to be and remain in full force and virtue.

RICHARD G. HEAD. [SEAL.]
JOHN MARK. [SEAL.]
MARTHA J. HEAD. [SEAL.]

TERRITORY OF NEW MEXICO,
County of Mora, ss:

I, Otto Lange, notary public, of the county aforesaid in the territory aforesaid, do hereby certify that John Mark and Martha J. Head and Richard G. Head, personally known to me as the same

persons whose names are subscribed to the above bond appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said bond as their free and voluntary act and for the uses and purposes herein set forth.

Given under my hand and the seal of said court this 5th day of May, A. D. 1899.

OTTO LANGE,
Notary Public.

TERRITORY OF NEW MEXICO,
County of Mora, ss:

I, John Mark and Martha J. Head, being first duly sworn as hereinafter certified, each for himself deposes and says that he signed, sealed and delivered the foregoing bond to the territory of New Mexico for the use of Richard G. Head, Jr., as surety for the said Richard G. Head, and further the said John Mark, that he is worth the sum of twenty-two hundred dollars. And the said Martha J.

Head, that he is worth the sum of twenty-two hundred dollars over and above all debts and liabilities and property exempt from execution.

JOHN MARK.
MARTHA J. HEAD.

Subscribed and sworn to before me this 5th day of May, A. D. 1899.

[N. P. SEAL.]

OTTO LANGE,
Notary Public.

TERRITORY OF NEW MEXICO,
County of Mora, ss:

Richard G. Head, being by me duly sworn deposes and says that he will truly, faithfully, legally and scrupulously perform his duties as guardian of Richard G. Head, Jr., minor to the best of his ability towards said ward and according to law.

RICHARD G. HEAD.

Subscribed and sworn to before me this 5th day of May, A. D. 1899.

[N. P. SEAL.]

OTTO LANGE,
Notary Public.

TERRITORY OF NEW MEXICO,
County of Mora, ss:

I, Tito Melendez, clerk of the probate court do hereby certify that the foregoing guardian's bond and oath have by me been duly recorded in book —, of letters of guardianship, page 264, kept in this office for such purpose.

TITO MELENDEZ,
Clerk of the Probate Court,
By PEDRO A. ORTEGA, *Deputy.*

TERRITORY OF NEW MEXICO,
County of Mora, ss:

In the Probate Court

In the Matter of the Guardianship of RICHARD G. HEAD, JR.,
RICHARD G. HEAD, Guardian.

The petition of Richard G. Head, guardian of Richard G. Head, Jr., respectfully shows:

That heretofore he was duly and legally appointed the guardian of Richard G. Head, Jr., by order of this court, entered of
92 record in the proceedings of said court, and that petitioner is now such duly qualified and acting guardian.

That petitioner took out life insurance upon his own life in the New York Life Insurance Company in the sum of \$20,000.00 as evidenced by policies numbered 599,690 and 599,691, or for the sum of \$10,000.00 each, payable to Richard G. Head, Jr., above mentioned.

That on the 3rd day of June, 1899, petitioner borrowed of said New York Life Insurance Company the sum of \$1,100.00 on each of said policies and deposited said policies above mentioned with said company as security for said loan, and that said loans are still in full force and effect against said policies and that the same were made under and by virtue of an order of this honorable court.

That on the 10th day of February, 1903, petitioner as such guardian of Richard G. Head, Jr., a minor, transferred and assigned all the right, title and interest in policy No. 599,690 above mentioned to Mary E. Head, daughter of petitioner and sister of Richard G. Head, Jr. That the consideration of such transfer was that the petitioner had met with financial reverses and was unable to make the payments of premiums due and to fall due on said policy, and the said Mary E. Head had assisted by her own efforts in keeping said policy in force. That the said New York Life Insurance Company by its duly authorized agent, accepted said assignment of said policy to said Mary E. Head. That the interest on the notes executed by petitioner for the loan of \$2,200.00 on each of said policies above mentioned, from said company is due, amounting to \$141.00 and that the annual premium of \$425.00 on each of said policies is also due and that unless paid by the 3rd day of May, 1904, petitioner will forfeit the said policies.

That petitioner is unable to meet and pay the premiums and interest above mentioned due on said policies.

That the said policies above mentioned and each of them have now a loan value in the sum of \$1,170, over and above the amount of the loans of \$1,100.00 above mentioned. That it will be
93 to the interest of said minor, Richard G. Head, Jr., to keep said policies in full force and effect, but that in order to do so it will be necessary to obtain permission of this court authorizing petitioner as such guardian to execute a note to said Insurance Company to obtain said loan for the purpose of paying said premiums and the interest due thereon.

That besides the indebtedness against said policies of \$1,100.00, and interest due thereon and the premium now due, petitioner has borrowed from the San Miguel National Bank of Las Vegas about the sum of \$650.00, to meet the payments of premiums due for the purpose of meeting the premiums which fell due in May, 1903. That for the purpose of paying the indebtedness already incurred in keeping said policies in force and the interest thereon and to meet the premiums now due, petitioner is desirous of obtaining an additional loan from said company on each of said policies in the sum of \$1,170.00 or a total of \$2,340.00.

Wherefore petitioner prays an order of this honorable court that he be permitted and authorized to execute a note or loan contract to the said New York Life Insurance Company for the purpose of obtaining a loan from said company in the sum of \$1,170.00 upon each of said policies above mentioned or a total loan of \$2,340.00, said loan to bear interest at the rate of five per cent per annum and also an order of this court confirming the action of petitioner in assigning said policy No. 599,690 to the said Mary E. Head, who will join in the execution of said loan contract for the loan on the policy now standing in her name.

Petitioner will ever pray.

RICHARD G. HEAD,
Guardian of Richard G. Head, Jr.
WM. G. HAYDON,
Las Vegas, N. M., Attorney for Petitioner.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

Richard G. Head, being duly sworn on oath states: That he has read the above and foregoing petition subscribed by him.
94 That he knows the contents thereof and that the same are true of his own knowledge.

That at the date of his appointment as guardian of said Richard G. Head, Jr., affiant was a resident of Watrous, Mora County, New Mexico, but is at present at Las Vegas, San Miguel County, New Mexico.

RICHARD G. HEAD.

Subscribed and sworn to before me this 23rd day of April, 1904.
[N. P. SEAL.] WM. G. HAYDON,
Notary Public.

Approved during vacation at Mora, N. M., April 26, 1904.
GAVINO RIBERA,
Probate Judge.

Filed in this office April 26th, 1904.
E. H. BIERNBAUM, *Clerk.*

TERRITORY OF NEW MEXICO,
County of Mora, ss:

In the Probate Court.

In the Matter of the Guardianship of RICHARD G. HEAD, JR.
RICHARD G. HEAD, Guardian.

Order of Court Authorizing Guardian to Borrow Money.

Upon reading and filing the petition of Richard G. Head, the duly and legally qualified and acting guardian of Richard G. Head, Jr., it appearing to the court that Richard G. Head has taken out life insurance upon his life in the sum of \$20,000.00, represented by two policies Nos. 599,690 and 599,691, in the New York Life Insurance Company, for the sum of \$10,000.00 each, and that Richard G. Head, Jr., is the beneficiary mentioned in said policies, and that the said Richard G. Head has heretofore under an order of this court obtained two loans from said company upon said life insurance policies in the sum of \$1,100.00 each, which are in full force and unpaid. That there is interest due on said loans in the sum of \$70.50 on 95 each, or a total of \$141.00. That the annual premiums on each policy in the sum of \$425.00 will have to be paid on or before the 3rd day of May, 1904. That the said Richard G. Head, to meet the payments due for former years has borrowed money and that he still owes therefor.

That the said policies have now a loan value each in the sum of \$1,170.00 over and above the loans above mentioned.

That in consideration of Mary E. Head, daughter of said Richard G. Head and sister of the minor, Richard G. Head, Jr., giving her financial aid and assistance in keeping said policies in effect, said Richard G. Head as such guardian on the 10th day of February, 1903, transferred and assigned all his interest, and as well the interest of Richard G. Head, Jr., in policy No. 599,690, to the said Mary E. Head, which has been accepted by the New York Life Insurance Company.

That the said Richard G. Head is now unable to meet the indebtedness hereinabove mentioned and as well to pay the premiums which are now due and that unless the same are paid by the 3rd day of May, 1904, said policies will be forfeited and the court being now sufficiently advised in the premises and satisfied therewith, deeming it to the best interest of said minor, Richard G. Head, Jr., doth now hereby order, adjudge and direct that the said Richard G. Head, guardian as aforesaid be and hereby is authorized and empowered to borrow from the said New York Life Insurance Company, the sum of \$1,170.00 on policy No. 599,690, and the sum of \$1,170.00 on policy No. 599,691 for the purpose of paying the indebtedness herein above mentioned and for the purpose of paying the premiums now due on said policies, and that to secure to said company the repayment of said loan, the said guardian is hereby authorized and empowered to make, execute and deliver to said com-

pany such notes or loan contracts as may be required by said Life Insurance Company therefor and upon the terms and conditions as required by said company.

It is further ordered that the action of said Richard G. Head, guardian as aforesaid, in execution said loan contracts above
96 mentioned to said company, being for the best interests of said minor and in order to keep the said policies in full force and effect, be and the same is hereby fully ratified and confirmed.

It is further ordered and adjudged by the court that the assignment made by the said Richard G. Head in his own name as guardian of said Richard G. Head, Jr., on the 10th day of February, 1903, of policy No. 599,690 to the said Mary E. Head, be and the same is hereby ratified and confirmed.

Approved during vacation at Mora, N. M., April 26th, 1904.

SABINO RIBERA,

Probate Judge.

Probate Court, Mora County and Territory of New Mexico.

The aforesaid petition and order was ordered to be entered and spread on the records of proceedings of said court and was approved in the regular term of May 2nd, 1904.

Filed in this office April 26th, 1904.

E. H. BIERNHAM,

Probate Clerk.

I, Juan Navarro, clerk of the probate court, within and for the county of Mora, and territory of New Mexico, do hereby certify, that the foregoing transcript, containing letters of guardianship, guardian's bonds, probate court records and petitions and order of court, in the matter of the guardianship of Richard G. Head, Jr., minor, and Richard G. Head, guardian, is a true and correct copy of all the records and papers now on file in this office pertaining to and affecting the said matter of the said guardianship of said minor Richard G. Head, Jr., and Richard G. Head, guardian.

In Witness Whereof, I have hereunto set my hand and the seal of the probate court of the county of Mora, New Mexico, at Mora, this 15th day of January, A. D. 1908.

[SEAL.]

JUAN NAVARRO,

*Clerk of the Probate Court for
Mora County, New Mexico.*

97 Mr. PRATT: I would like to call Miss Head for cross examination on one further question.

MARY E. HEAD called:

Cross-examination by Mr. PRATT:

Q. Whose signature is that to the paper which I hand you?

A. That is my father's signature.

Q. It purports to be the signature of Richard G. Head, guardian

of Richard G. Head, Jr., and also Richard G. Head, both of those signatures are your father's signatures are they not?

A. That is my father's signature.

Mr. PRATT: We offer that in evidence; it is the loan agreement.

Mr. DEATHERAGE: There is no objection, only it is immaterial.

By the COURT: It is admitted subject to the objection.

Mr. PRATT: Please let it appear as part of Miss Head's cross examination, and which is in words and figures as follows:

SPECIAL NOTICE.—The policy loan made under this agreement is not conditioned upon any obligation or requirement to make application for additional insurance, and no person is authorized to make any charge for obtaining it.

Policy Loan Agreement.

The undersigned Richard G. Head, guardian, Richard G. Head, Jr., and Richard G. Head, hereby acknowledge the receipt this 3rd day of April, 1904, of the sum of twenty-two hundred and seventy dollars (\$2,270.00) from the New York Life Insurance Company at the city of New York, as a loan under policy No. 599,691, issued by said company on the life of Richard G. Head, in accordance with and subject to the terms of said policy as collateral security for the repayment of said loan with interest; hereby pledge and deposit
98 said policy and its accumulations with said company subject to the following conditions:

1. Interest on said loan shall be paid in advance from this date to the 3rd day of April, 1905, the date of the next anniversary of said policy and annually in advance on and after said date, at the rate of five (5) per cent per annum at the Home Office of said company in the city of New York.

2. If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount, in accordance with section 86, chapter 690 of the laws of 1892, of the state of New York.

3. The right to repay said loan to said company at any time before settlement shall have been made in accordance with section 2, of this agreement, and to reclaim possession of said policy is hereby reserved. The repayment of said loan and accrued interest if any shall cancel and annul this agreement without further action.

4. In the settlement of any claim or any benefit under said policy before said loan shall have been fully repaid, or before settlement shall have been made in accordance with section 2 of this agreement said company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy.

5. Any interest paid beyond the date of any repayment or settlement as herein provided shall be refunded.

6. As the amount of loan available at any time any previous loan then unpaid, the execution of a subsequent loan agreement, without further action cancels and annuls any previous agreement.

7. Any notice under this agreement duly addressed and mailed to the last known post office address of the undersigned shall be deemed to have been served on the day following the date of said mailing.

RICHARD G. HEAD,
Guardian of Richard G. Head, Jr.
RICHARD G. HEAD.

Signed and sealed in presence of
WM. G. HAYDON.

Forwarded from Pueblo Branch Office, June 27, 1904.
M. KELLOGG, *Cashier.*

(Endorsed on face: I. C. Whitney, Auditor. \$2,270, July 26, 1904. Per W. G. K.)

Mr. PRATT: The defendant offers in evidence the deposition of Martin Kellogg, taken at Pueblo, Colorado, January 13th, 1908, with all of the exhibits and letters identified in said deposition, and all of which is in words and figures as follows:

MARTIN KELLOGG, being produced, cautioned and solemnly sworn, testifies as follows:

Direct examination by Mr. REYNOLDS:

Q. Please state your name, residence and occupation.

A. Martin Kellogg of Pueblo, Colorado, Cashier of the New York Life Insurance Company.

Q. How long have you been in the employ of the defendant?

A. I first began work with the N. Y. Life in August, 1894, with Mr. Halloran.

Q. Where were you at that time?

A. Albuquerque, N. M.

Q. How long did you remain at Albuquerque working for the N. Y. Life?

A. From August 1st, 1894, to April 1st, 1901, with the exception of the time from Jan. 1st, 1895, to Jan. 1st, 1896, when I was otherwise employed.

Q. In connection with your employment by the defendant at Albuquerque, do you know what premiums were paid on the policies of insurance on the life of Richard G. Head No. 599,690 and 599,691?

A. Yes, sir.

100 Q. State whether it was a part of your duty in your work for the defendant to receive the premiums paid on these policies.

A. Yes, sir.

Q. When you left Albuquerque did you come direct to Pueblo?

A. Yes, sir.

Q. Have you been in the employ of the defendant continuously from the time you came to Pueblo?

A. Yes, sir.

Q. In what capacity?

A. As cashier.

Q. State whether or not since you have been in Pueblo, it has been a part of your duty to receive premiums paid on the policies above mentioned.

A. Yes, sir.

Q. Please state whether the Pueblo office was open prior to the Albuquerque office or not?

A. It was not.

Q. When was the Pueblo office of the defendant opened?

A. April 1st, 1901.

Q. When you came here?

A. Yes, sir.

Q. Please state Mr. Kellogg, if you know the periods of time when the company maintained an office at Albuquerque.

A. It was opened January 1, 1895, and abandoned April 1, 1901, and re-established I think October 1, 1904, and again abandoned May 1, 1906.

Q. What became of the records of the company kept at the Albuquerque office?

A. They were all transferred to the Pueblo office.

Q. Have you now here in the Pueblo office, records showing the payment of premiums on the policies in question, at the Albuquerque office, also the records showing the payment of premium, if any, at the Pueblo office on these policies?

A. Yes, sir.

Q. Will you produce now, if you have them, the original books of entry showing the payment of premiums on the policies in question at the Albuquerque office, also the Pueblo office?

A. Yes, sir.

Q. Have you now before you these books?

A. Yes, sir.

Q. Describe them.

A. They are large books containing the records of premiums paid through the respective offices, and are the books in which the
101 first entries of the payment of these premiums were made.

Q. Will you please read into the record from these books of original entry the premiums paid on the policies in question, at the Albuquerque office of the defendant?

A. Yes, sir; premium due April, 1895, paid April 29, 1895, premium due April, 1896, paid April 18, 1896; premium due April, 1897, paid April 22, 1897; premium due April, 1898, paid May 2, 1898; we find no record of payment of premium due April, 1899, at this office. Premium due April, 1900, paid by blue note settlement of \$107 cash on premium and \$55 policy loan interest; with

a note for \$318 due Oct. 3rd, note paid Oct. 2nd, 1900. This note settlement was made April 25, 1900.

Q. State whether or not these entries were made by you in your handwriting.

A. Yes, sir, with the exception of premiums for 1895 and 1896.

Q. Do you know in whose handwriting the entries for those years is?

A. Yes, sir.

Q. Who made those entries?

A. H. W. Reynolds.

Q. Who was he?

A. He was cashier for the defendant at that time.

Q. Now will you please read into the record the entries in regard to payment of premiums on the policies in question at the Pueblo office of the defendant, as they appear upon these books of original entry?

A. Yes, sir; premium due April, 1901, paid by blue note settlement on 5/2, \$107 cash on premium and \$55 loan interest with a note of \$318 due Oct. 3rd, 1901, note paid Oct. 2nd. Premium due April, 1902, paid by blue note settlement, report 4/29/02, \$107 cash on premium and \$55 loan interest, note of \$318 due Oct. 3rd, note paid Oct. 20/02. Premium due April, 1903, settled by lien note, reported May 4, 1903, lien note and loan interest paid in cash. Premium due April, 1904, paid from loan of \$2270 reported July 29, 1904. Premium due April, 1905, there are different entries for the two policies. No. 599,690 was not paid. On No. 599,691 blue note settlement was reported May 4, 1905, \$107 cash on premium and \$113.50 loan interest; note for \$318 due October 3rd, 1905. Note not paid.

Q. In whose handwriting are the entries of the premiums paid to the Pueblo office?

A. My own with the exception of that for 1905, which is in the handwriting of George R. Tryner.

Q. Who was he?

A. He was bonded clerk in the Pueblo office and acting under my instructions.

Q. Do you know of your own knowledge that the entries to which you have just testified concerning the payment of premiums are correct, and that the premiums were paid as shown by in these books?

A. Yes, sir.

Q. Do you know George R. Tryner?

A. Yes, sir.

Q. Was he in the employ of the defendant to your knowledge?

A. Yes, sir.

Q. In what capacity and when?

A. He was bonded clerk in the Pueblo office from November 1, 1904, until he was transferred to Albuquerque as cashier of the New Mexico office, re-established on that date.

Q. Do you know his handwriting?

A. Yes, sir.

Q. Was he any relation of yours?

A. No, sir.

Q. Do you know the handwriting of Richard G. Head, the insured under the policies in question?

A. As far as one can know from a continuous correspondence extended over a period of years.

Q. I hand you a letter dated Pueblo, Colo., April 5, 1904, purporting to be signed by you, as cashier; please state if you wrote that letter.

A. Yes, sir, I did; said letter is handed the stenographer with the request that she put her initials in the upper right hand corner and mark it exhibit 1 for the purpose of identification; said letter marked exhibit 1 G. N. J. as requested.

(Which is read in evidence, is as follows, to-wit):

103

PUEBLO, COL., April 5th, 1904.

Secretary's Department Division Policy Loans, N. Y. Life Ins. Co.

Re No. 599,690 & 691—Head.

GENTLEMEN: Enclosed herewith please find a letter from the insured inquiring for a further loan under his policies for your kind attention.

Respectfully yours,

M. KELLOGG, *Cashier*.

Q. Is the letter signed Richard G. Head, dated 4/2/1904 attached to that letter the one which was attached when you mailed it?

A. It is.

Q. Do you recognize this letter as having been in your hands by any marks upon it?

A. Yes, sir.

Q. What marks?

A. Lines that were made to indicate the number of annual premiums that had been paid on policy at the time of its receipt.

Q. Did you not put that scoring, or those lines, on that letter at that time?

A. I did.

Q. Will you please hand that letter to the stenographer to be marked exhibit 2 for purposes of identification?

A. Yes, sir.

(Letter is so marked by stenographer) and read in evidence here, which is in words and figures as follows:

LAS VEGAS, N. M., 4/2/1904.

M. Kellogg, Cashier, Pueblo, Colorado.

DEAR SIR: I have your notices of the amount of my premiums due tomorrow, and on which I believe I have 30 days additional in which to make payment. I now write to ask you to please advise

me if there are any accumulations on my policies which may be used in part payment of these now due premiums. Kindly let me hear from you at your early convenience.

Yours truly,

RICHARD G. HEAD.

(Endorsed on face: Received Apr. 8, 1904, Policy Loan Div.)

104 Q. Was that letter mailed to the company in New York?
A. Yes, sir.

Q. Did you write to Richard G. Head on the same date, that you were forwarding this letter to the company, and if so, have you a copy of your letter to him?

A. Yes, sir.

Q. Where does this copy appear?

A. In our general letter book in use at that time at page 672.

Q. Will you please tear that page 672 from your letter book and have it marked exhibit 3 for purposes of identification?

A. Yes, sir (exhibit so marked) and is in words and figures as follows:

APRIL 5TH, 1904.

Mr. Richard G. Head, Las Vegas, N. M.

DEAR SIR: We have yours of the 2nd relative to a further loan under your policies No. 599,690 & 691 which we have this day forwarded to the home office for attention. As soon as a reply is received we will give you the desired information.

I believe there is a second loan available conditioned on the payment of the first, however, the beneficiary is a party to the contract and if of age his action will be legal; however, there may be some requirement relative to this matter that I do not fully understand, hence I have as above stated, referred your letter to the home office.

Respectfully yours,

M. KELLOGG, *Cashier.*

Q. Please look at page 28 of your general letter book and state whether that letter was written and signed by you, and mailed to the insured on the date as shown by that copy?

A. This is a printed form filled out with the date as specified and mailed to the insured.

Q. Did you sign it?

A. Yes, sir.

Q. Will you tear out page 28 from your letter book and hand it to the stenographer to be marked exhibit 4 for purposes of identification?

A. Yes, sir.

105 (Said letter identified and offered in evidence by the defendant in words and figures as follows:)

PUEBLO BRANCH OFFICE, April 13, 1904.

Richard G. Head, Las Vegas, N. M.

Re Policy No. 599,690 & 691.

DEAR SIR: According to our records a premium of \$991.00 was due on the above policies on April 3rd, 1904, and is still unpaid. The period of one month during which the premium may be paid with interest at the rate of five per cent per annum from above date without other requirements ends on May 3rd, 1904.

Trusting that before that date we shall receive a remittance for the amount of the premium, with interest, we remain,

Yours truly,

M. KELLOGG, *Cashier*.

Q. What is the next letter of which you have a record written to the insured?

A. A copy of the home office letter relative to additional loan on the policies.

Q. What is the date of that letter?

A. April 18, 1904.

Q. Where do you find a copy of that letter?

A. On page 71 of the general letter book in use at that time.

Q. Will you tear that page from the record and have it marked exhibit 5 for purposes of identification?

A. Yes, sir.

(Letter so marked is here offered in evidence and is as follows:

APRIL 18, 1904.

Mr. R. G. Head, Las Vegas, N. M.

DEAR SIR: Below please find copy of letter received this day from the home office relative to further loans on your policies No. 699,690 & 691.

106 "We reply to your favor of the 5th inst. duly received with enclosure as stated that the above policies provide by their terms for loans to the extent of \$2,270.00 each (less the present indebtedness) conditioned upon the payment of premiums to April, 1905.

In order to obtain an additional loan as security on this policy, it will be necessary for the guardian of Richard G. Head, Jr., beneficiary named in the policy, to obtain from the court an order authorizing the pledging of the minor's interest in the policy with the company as collateral security. On receipt of a certified copy of the petition to the court and of the order granted thereon, we would instruct you as to the preparation of the loan papers.

According to our records Richard G. Head, father of the insured, was appointed guardian for his son, Richard G. Head, Jr. The company, however, must be furnished with evidence that said appointment is still in force."

Yours truly,

M. KELLOGG, *Cashier*.

Q. Did you sign that letter and mail it to the insured?

A. Yes, sir.

Q. Are you able to produce the answer, if any was received to your letter of April 18, 1904?

A. No, sir.

Q. What is the record that you have next of any communication with the insured?

A. On April 22, 1904.

Q. Do you find a copy of a letter written to him on that date, signed by you?

A. Yes, sir.

Q. Where does it appear?

A. At page 92 of the general letter book in use at that time.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 6 for the purposes of identification?

A. Yes, sir.

Letter so marked—here read in evidence as follows:

107 APRIL 22ND, 1904.

Richard G. Head, Las Vegas, N. M.

DEAR SIR: We have yours of the 21st relative to a loan under your policies No. 599,690 & 691. We would kindly call your attention to copy of Home Office instructions which we have to follow in handling the case. Upon receipt of the requirements they are to be forwarded to the Home Office for further advice; however, for your information will say that your application for a loan as well as deduction of premiums will fully protect your insurance, provided, of course, there is no unnecessary delay in procuring the requirements.

Respectfully yours,

M. KELLOGG, *Cashier*.

Q. What is the next letter of which you have a record, relative to these policies?

A. A letter addressed to W. G. Haydon of Las Vegas, N. M., dated April 29, 1904.

Q. Where do you find it?

A. On page 140 of the general letter book in use at that time.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 7 for purposes of identification?

A. Yes, sir.

(Letter so marked is here read in evidence as follows):

APRIL 29, 1904.

Mr. W. G. Haydon, Las Vegas, N. M. Opera House Bldg.

DEAR SIR: We have yours of the 27th with order of court authorizing further loan under policies No. 599,690 & 691 R. G. Head. We notice that you have asked *that you have asked* for a loan of \$2,340 while our letter to Mr. Head stated that the amount of the loan available was but \$2,270 less the present indebtedness.

108 In preparing the loan agreements the Home Office will use the sum specified in their letter as the amount available at the present time. Have wired Mr. Head as requested.
Respectfully yours,

M. KELLOGG, *Cashier.*

Q. Please look at the paper which I now hand you and state what it is and whether it was ever in your hands before?

A. It is an assignment of policy No. 599,690 by Richard G. Head, Jr., being a minor, by Richard G. Head, Guardian, to Mary E. Head of Las Vegas, N. M.

Q. When, if at all, was it in your hands and where did you get it?

A. I received it from the insured on Feb'y 12, 1903.

Q. What did you do with it when in your possession Feb'y 12, 1903?

A. I forwarded it to the home office for record.

Q. Will you please hand it to the stenographer to be marked exhibit 8 for the purposes of identification and made of part of your deposition?

A. Yes, sir.

For Value Received, we hereby assign and transfer unto Mary E. Head of East Las Vegas, New Mexico, the policy of insurance known as 599,690 issued by the New York Life Insurance Company upon the life of Richard G. Head of East Las Vegas, New Mexico, formerly of Watrous, N. M., and all dividends, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy and to the rules and regulations of the company. The said Richard G. Head being the duly and legally appointed guardian of said Richard G. Head, Jr., a minor, and as such guardian executes this assignment, the proceeds thereof being for benefit of said Richard G. Head, Jr., the beneficiary of said policy.

Witness our hands and seals this 10th day of February, nineteen hundred and three.

RICHARD G. HEAD, JR.,
By RICHARD G. HEAD, *Guardian.*
RICHARD G. HEAD.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

On this 10th day of February, 1903, before me personally came Richard G. Head as Guardian of Richard G. Head, Jr., and
109 the said Richard G. Head to me known to be the individuals described in and who executed the foregoing assignment and acknowledged that they executed the same.

WM. G. HAYDON,
Notary Public.

The New York Life Insurance Company, in accordance with its rules as stated below, has retained the duplicate of this assignment.

CHAS. C. WHITNEY, *Sec'y,*
Per LOSSER.

New York, Mar. 10th, 1903.

Notice:—The rules of the company require that assignments of policies issued by it shall be made in duplicate; that both copies shall be sent to the Home Office, and that one copy shall be retained by the company and the other returned.

The company has no responsibility for the validity of any assignment.

The acknowledgement must be made before an officer duly authorized to administer oaths and his authority and the genuineness of his signature must be attested by the clerk of a court of record under his official seal.

1100. 6/3/99.

Forwarded from 3/11/03 to Pueblo Branch Office Feb'y 12, 1903.

M. KELLOGG,
Cashier, Pueblo.

(Endorsed: Received Home Office Mar. 9, 1903—Received Feb'y 16, 1903—Home Office.)

Q. I now hand you a policy loan agreement signed by Mary E Head, assignee, dated April 3, 1904, and will ask you if it was ever in your possession before, and if so, from whom did you receive it, and what did you do with it?

A. Yes, sir, it was filled out by me and mailed to the insured for execution and then returned to this office June 27, 1904, and by me forwarded to the home office for attention.

110 Q. Was it signed by Mary E. Head, assignee, when it was received back from the insured by you?

A. Yes, sir.

Q. And when it was forwarded to New York?

A. Yes, sir.

Q. Will you please hand that to the stenographer and have it marked exhibit 9 for purposes of identification?

A. Yes, sir. (Paper so marked is here read in evidence, as follows):

SPECIAL NOTICE. The policy loan made under this agreement is not conditioned upon any obligation of requirement to make application for additional insurance and no person is authorized to make any charge for obtaining it.

Loan Policy Agreement.

The undersigned, Mary E. Head, assignee, hereby acknowledges the receipt this 3rd day of April, 1904, of the sum of twenty-two hundred and seventy dollars (\$2,270) from the New York Life Insurance Company at the City of New York as a loan under policy No. 599,690 issued by said company on the life of Richard G. Head in accordance with and subject to the terms of said policy and as collateral security for the repayment of said loan with interest hereby pledge and deposit said policy and its accumulations with said company subject to the following conditions:

1. Interest on said loan shall be paid in advance from this date to the 3rd day of April, 1905, the date of the next anniversary of said policy, and annually in advance on and after said date at the rate of five (5) per cent per annum at the Home Office of said company in the city of New York.

2. If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount in accordance with section 88, chapter 690 of the laws of 1892 of the state of New York.

3. The right to repay said loan to said company at any
111 time before settlement shall have been made in accordance with section 2 of this agreement and to reclaim possession of said policy, is hereby reserved. The repayment of said loan and accrued interest, if any, shall cancel and annul this agreement without further action.

4. In the settlement of any claim or of any benefit under said policy, before said loan shall have been fully repaid, or before settlement shall have been made in accordance with section 2 of this agreement, said company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy.

5. Any interest paid beyond the date of any repayment or settlement, as herein provided, shall be refunded.

6. As the amount of loan available at any time includes any previous loan then unpaid, the execution of a subsequent loan agreement without further action cancels and annuls any previous agreement.

7. Any notice under this agreement duly addressed and mailed to the last known post-office address of the undersigned shall be deemed to have been served on the day following the date of said mailing.

MARY E. HEAD, *Assignee*.

Signed and sealed in presence of
WM. G. HAYDON.

Forwarded from Pueblo Branch Office, June 27, 1904.

M. KELLOGG, *Cashier*.

(Endorsed: Auditor's Office June 19, 1905.)

Q. I now hand you policy loan agreement signed by Richard G. Head Guardian of Richard G. Head, Jr., and Richard G. Head, dated April 3, 1904, on policy 599,691 and would ask you whether it was ever in your — -ceived it, and what you did with it?

A. It was filled out by me and forwarded to the insured for execution, returned June 27, 1904, and forwarded to the home office the same day for attention. These policy loan agreements were
112 in duplicate and one copy was returned to the insured with the loan checks.

Q. Will you please hand this to the stenographer to be marked exhibit 10 for purpose of identification?

A. Yes, sir.

Paper so marked is now read in evidence as follows:

SPECIAL NOTICE.—The policy loan made under this agreement is not conditioned upon any obligation or requirement to make application for additional insurance and no person is authorized to make any charge for obtaining it.

Policy Loan Agreement.

The undersigned, Richard G. Head, guardian, hereby acknowledges the receipt this 3rd day of April, 1904, of the sum of twenty-two hundred and seventy dollars (\$2,270) from the New York Life Insurance Company at the city of New York as a loan under policy No. 599,691, issued by said company on the life of Richard G. Head in accordance with and subject to the terms of said policy and as collateral security for the repayment of said loan with interest, hereby pledge and deposit said policy and its accumulations with said company subject to the following conditions:

1. Interest on said loan shall be paid in advance from this date to the 3rd day of April, 1905, the date of the next anniversary of said policy and annually in advance on and after said date, at the rate of five (5) per cent per annum at the Home Office of said company in the city of New York.

2. If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount, in accordance with section 88, chapter 690 of the laws of 1892 of the state of New York.

3. The right to repay said loan to said company at any time before settlement shall have been made in accordance with section 113 2 of this agreement and to reclaim possession of said policy is hereby reserved. The repayment of said loan and accrued interest, if any, shall cancel and annul this agreement without further action.

4. In the settlement of any claim or of any benefit under said policy, before said loan shall have been fully repaid, or before settlement shall have been made in accordance with section 2 of this agreement, said company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy.

5. Any interest paid beyond the date of any repayment or settlement, as herein provided shall be refunded.

6. As the amount of loan available at any time includes any previous loan then unpaid, the execution of a subsequent loan agreement, without further action, cancels and annuls any previous agreement.

7. Any notice under this agreement duly addressed and mailed

to the last known post-office address of the undersigned shall be deemed to have been served on the day following the date of said mailing.

RICHARD G. HEAD,
Guardian of Richard G. Head, Jr.
RICHARD G. HEAD.

Signed and sealed in presence of
WM. G. HAYDON.

Forwarded from Pueblo Branch Office, June 17, 1904.
M. KELLOGG, *Cashier*.

Endorsed: Auditor's Dept., Apr. 11, 1904. I. C. Whitney, Auditor, Per W. G. K. \$2,270, July 26, 1904.

Q. I now hand you application for loan form 2270, on policy No. 599,690 signed by Mary E. Head, assignee, and would ask you whether this was ever in your possession before, if so, when, from whom you received it and what you did with it?

A. It was typewritten at this office and forwarded to the
114 insurance — attached to loan agreements, returned to this office June 27, 1904, and forwarded to the loan office for attention.

Q. Will you please hand this to the stenographer and have it marked exhibit 11 for purpose of identification?

A. Yes, sir.

Exhibit so marked, is now here read in evidence as follows:

LAS VEGAS, N. M., *April 3rd*, 1904.

New York Life Insurance Company, 346 & 348 Broadway, New York:

Re Policy No. 599,690.

Application is hereby made for a cash loan of \$2,270 on the security of the above policy issued by the New York Life Insurance Company on the life of Richard G. Head subject to the terms of said company's loan agreement.

Said policy is forwarded herewith for deposit with said company as collateral security together with said company's loan agreement duly signed and in duplicate.

MARY E. HEAD, *Assignee*.

Forwarded from Pueblo Branch Office, June 27, 1904.
MARTIN KELLOGG, *Cashier*.

(Endorsed: Received July 1, 1904, Policy Loan Division.)

Q. I now hand you application for loan, form 2270, on policy No. 699,691 and will ask you whether it was ever in your possession and if so, when, from whom you received it, and what you did with it?

A. It was typewritten at this office and forwarded to the insured attached to loan agreement, and returned by him to this office June 27, 1904, and forwarded to the home office for attention.

Q. Will you please hand it to the stenographer and have it marked exhibit 12 for purpose of identification?

A. Yes, sir.

Exhibit so marked, is now read as follows:

115 LAS VEGAS, N. M., April 3rd, 1904.
New York Life Insurance Company, 346 & 348 Broadway, New
York:
Re Policy No. 599,691.

Application is hereby made for a cash loan of \$2,270.00 on the security of the above policy issued by the New York Life Insurance Company on the life of Richard G. Head subject to the terms of said company's loan agreement.

Said policy is forwarded herewith for deposit with said company as collateral security together with said company's loan agreement duly signed in duplicate.

RICHARD G. HEAD,
Guardian of Richard G. Head, Jr.
RICHARD G. HEAD.

Forwarded from Pueblo Branch Office, June 27, 1904.

M. KELLOGG, *Cashier.*

Q. Did you write a letter on June 23, 1904, to the insured with reference to loans on these policies?

A. Yes, sir.

Q. Have you a copy of that letter?

A. Yes, sir.

Q. Where does it appear?

A. At page 516 of our general letter book, in use at that time.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 13 for purposes of identification?

A. Yes, sir.

Exhibit so marked, here offered and read in evidence as follows:

JUNE 23RD, 1904.

Mr. R. G. Head, Las Vegas, N. M.

DEAR SIR: I spent most of the month of May in California on my vacation and supposed that the loan applied for under your policies had received the proper attention during my absence. I find from a letter I received this day from the home office that the loan agreements, for which we were to receive instructions to prepare, referred to in our last letter to you containing a copy
116 of the home office letter had not been attended to.

Upon receipt of advice from the home office enclosed herewith please find agreements for execution under policy No. 599,690 together with request for loan and request for deduction to be signed, Mary E. Head, assignee, provided she is of legal age. The company must be furnished with a statement giving her date of birth, together with assignment of her dated Feb. 10th, 1903.

Under policy No. 699,691, these agreements are to be signed by Richard G. Head, guardian of Richard G. Head, Jr., and Richard G. Head, all papers to be executed the same as the names are written in the body of the agreements.

Upon their return to this office duly executed together with the requirements, namely, assignment to Mary E. Head, together with statement of the date of her birth, they will have our prompt attention.

We regret very much the delay occasioned in this transaction; however, there will be no trouble after the execution of the enclosed papers in having the loan rushed through at another date.

Yours truly,

M. KELLOGG, *Cashier.*

Q. Did you on June 27, 1904, write to the insured a letter in reference to these loan agreements which have been identified and offered in evidence?

A. Yes, sir.

Q. Where does that letter appear?

A. At page 536 of our general letter book in use at that time.

Q. Will you please tear that page from the book and hand it to the stenographer to be marked exhibit 14 for purposes of identification?

A. Yes, sir.

Exhibit so marked, and read in evidence as follows:

117

JUNE 27, 1904.

Richard G. Head, Las Vegas, N. M.

DEAR SIR: We have yours of the 25th with loan agreements duly executed under your policies No. 599,690 & 691 which go forward this day to the home office for attention.

M. KELLOGG, *Cashier.*

Q. Do you find any other letter in your letter book to the insured in regard to these loans?

A. Yes, sir.

Q. Where does that appear?

A. At page 646 of the general letter book.

Q. What is its date?

A. July 14, 1904.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 15, for purposes of identification?

A. Yes, sir.

Exhibit so marked, and read in evidence as follows:

JULY 14, 1904.

Richard Head, Las Vegas, N. M.

DEAR SIR: Referring to your policy No. 599,690 we have an inquiry from the home office as follows: "In the case of 599,690 we notice that since the present loan was granted the insured has as guardian for his minor son and for himself assigned the policy to Mary E. Head. If the insured obtained an order of court authorizing him to make this assignment you will please obtain a certified copy of same as it was necessary that he should obtain such permission from the court in order to dispose of his minor son's interest in the policy."

Kindly advise if copy of court order was enclosed in your other court papers forwarded. Your prompt attention will greatly oblige.

Yours truly,

M. KELLOGG, *Cashier.*

118 Q. Please look at the paper I now hand you, dated April 3, 1904, signed Mary E. Head, assignee, and state whether it was ever in your possession before, and if so, when from whom you received it, and what you did with it?

A. It was typewritten in this office, sent to the insured for execution, and returned to this office June 27, 1904, attached to the loan agreements and forwarded to the home office for attention.

Q. Was that document which you hold in your hand, returned signed as it appears to be signed, with the typewritten portion in the same condition that it now is, at the time you had it in your possession June 27, 1904?

A. Yes, sir.

Q. Please hand it to the stenographer to be marked exhibit 16 for purposes of identification.

A. Yes, sir.

Exhibit so marked, is offered and read in evidence as follows:

LAS VEGAS, N. M., *April 3rd*, 1904.

New York Life Insurance Company, 346 & 348 Broadway, New York

Re Policy No. 599,690.

Please deduct from the cash loan of \$2,270.00 applied for on April 3rd, 1904, on the security of the above policy an amount sufficient to pay prior loan outstanding note and premiums and interest to carry policy to April 3rd, 1905.

MARY E. HEAD, *Assignee.*

Witness:

WM. G. HAYDON.

Forwarded from Pueblo Branch Office, June 27, 1904.

M. KELLOGG, *Cashier.*

Q. I now hand you paper dated April 3, 1904, signed Richard G. Head, guardian for Richard G. Head, Jr., and Richard G. Head; was this ever in your possession before, if so, when, from whom you received it and what did you do with it?

A. It was typewritten at this office, sent to the insured for execution and returned to this office June 27, 1904, attached to the loan agreements and forwarded to the home office for attention.

Q. Will you please hand it to the stenographer to be marked exhibit 17 for purposes of identification?

A. Yes, sir.

Exhibit so marked, offered and read in evidence as follows:

LAS VEGAS, N. M. *April 3rd, 1904.*

New York Life Insurance Company, 346 & 348 Broadway, New York.

Re Policy No. 599,691.

Please deduct from the cash loan of \$2,270.00 applied for on April 3rd, 1904, on the security of the above policy an amount sufficient to pay prior loan outstanding note and premiums and interest to carry policy to April 3rd, 1905.

RICHARD G. HEAD,
Guardian of Richard G. Head, Jr.
RICHARD G. HEAD.

Witness:

WM. G. HAYDON.

Forwarded from Pueblo Branch Office, June 27, 1904.

M. KELLOGG, *Cashier.*

Q. Please state whether the typewritten portion of that paper was the same when you received it signed as it now appears on June 27th, 1904?

A. Yes, sir.

Q. Do you know whether or not a loan of \$2,270 was made by the defendant on these policies?

A. Yes, sir.

Q. Please look at the letter I hand you, addressed to you, signed by Richard G. Head, and tell whether you received this from the insured or not?

A. Yes, sir, I did.

Q. Will you please hand that to the stenographer to be marked exhibit 18 for the purposes of identification?

A. Yes, sir.

Exhibit so marked, and here offered and read in evidence as follows:

120

LAS VEGAS, N. M., *July 15, 1904.*

Mr. M. Kellogg, Pueblo, Colorado.

DEAR SIR: Your letter of the 14th inst., regarding the question asked by the home office of your company as to policy No. 599,690 will say that the assignment as originally made by me to Mary E. Head was without first obtaining an order of the probate court, but in the petition last made for the purpose of obtaining this loan my action in making the assignment was set out in the petition and the reason therefor which was to obtain money to meet the payments of premiums last year and in the petition I asked the probate court to approve this assignment, and in the order of the court upon this petition my action in making the assignment was fully ratified and confirmed. This will fully appear in the certified copies of the petition and order which I recently forwarded to you.

Trusting this will explain the matter and give the information requested and that this matter may be closed at as early a date as possible, I remain

Very truly yours,

RICHARD G. HEAD.

In connection with above exhibit 18a offered and read in evidence as follows:

R. G. Head.

LAS VEGAS, N. M., *Mch 15, 1905.*

New York Life Ins. Co., New Mexico Branch Office, Albuquerque, N. M.

Notices of premiums and policy loan interest, under date March 13th, 1905, due April 3rd next, has been rec'd.—total on two policies and loans to be due at that date aggregate \$1,077.00 on policies Nos. 599,690 and 599,691.

I write to ask in view of my inability to meet the amount then required is there any arrangement by doing that would enable me to save at least a part of my insurance? My financial affairs are such that I do not believe I can meet this coming payment, yet with some \$15,000.00 premiums heretofore paid your company I am loath to lose my insurance. Let me hear.

Y'rs Tr'ly,

R. G. HEAD.

Q. Please look at the letter I hand you, dated May 4, 1905, signed George R. Tryner, cashier, and state whether you know if this letter was signed by Mr. Tryner or not?

A. It was.

Q. That is his signature?

A. Yes, sir.

Q. Can you state whether or not that letter, with the application for paid up insurance on policy No. 599,690 was mailed by Mr. Tryner from Albuquerque, or not?

A. I can say it was, because it appears to have been handled by the stamp upon it, in the regular course in which such matters are handled between branch offices and the home office in New York. It must have been preceded by some correspondence.

Q. Please look at page 56 of the general letter book which I hand you and state whether you recognize the signature of the copy of letter shown on that page?

A. Yes, sir.

Q. Whose signature is it?

A. That of George R. Tryner.

Q. What is that letter book?

A. It is the general letter book for N. M. in use March, 1905.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 19 for purposes of identification?

A. Yes, sir.

Exhibit so marked, offered and read in evidence; as also exhibit 19a in connection therewith, and are as follows:

EXHIBIT 19.

MARCH 17, 1905.

Mr. Richard G. Head, Las Vegas, N. M.

DEAR SIR: I have your favor of the 15th inst. and note what you say in regard to not being able to meet the full amount of
122 premium and interest due on your two policies Nos. 599,690-1.

Inasmuch as you have already taken out the full amount of loan available under each policy it will not be possible for us to assist you by granting any further loan. The best proposition we can make you would be to accept one-fourth of the premium in cash, conditioned upon your signing a blue note for the balance due six months from April 3rd.

I wish you would kindly let me know at once if this arrangement will be satisfactory to you.

Yours very truly,

GEO. R. TRYNER, *Cashier.*

EXHIBIT 19, A.

R. G. Head.

LAS VEGAS, N. M., March 16, 1905.

New York Life Ins. Co., Geo. R. Tryner, Cashier, Albuquerque, N. M.

DEAR SIR: Yours 17th in regard to arrangement for protection my two policies in your company received and noted. Replying I may say I must certainly make an effort to comply with the terms you name in your letter of date above stated namely, "payment of one-fourth of the premium in cash and the signing of a six months' note from April 3rd for balance." However, I ask to be advised if I

am not entitled to the one month's grace from April 3rd, 1905, in which to make the one-fourth cash payment? Kindly advise me.

Yours truly,

RICHARD G. HEAD.

Q. I believe that you have testified that this letter book came into the possession of the Pueblo office as part of the records of the Albuquerque office, when that office was discontinued?

A. Yes, sir; that office was called the New Mexico office.

Q. Do you find any other letter in that same letter book?

A. Yes, sir, on page 79 dated March 20, 1905, a letter was addressed to the insured.

123 Q. By whom is the copy of the letter signed?

A. By George R. Trynor, cashier.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 20 for purposes of identification?

A. Yes, sir.

Exhibit so marked, offered and read in evidence, as also 20A in connection therewith.

MARCH 20, 1905.

Mr. Richard G. Head, Las Vegas, N. M.

DEAR SIR: In reply to your favor of the 16th inst., I beg to enclose herewith notes made out for \$318 each under your two policies. The cash required will be \$107 on each plus the \$113.50 interest item. In case you take the month's grace in remitting the cash, it will be necessary to add interest at the rate of 5% per annum for one month on the cash item.

Trusting that this method of meeting your premiums will be satisfactory, I am

Yours very truly,

GEO. R. TRYNOR, *Cashier.*

P. S.—Kindly have the assignee under these policies sign the notes with you. G. R. T.

LAS VEGAS, NEW MEXICO, *March 27, 1905.*

New York Life Ins. Co., Geo. R. Tryner, Cashier, Albuquerque, N. M.

DEAR SIR: Replying to yours 20th inst. with enclosue 2 notes, I may say that I shall not be able to meet the cash payment required before the expiration of the one month's grace. May I ask shall I execute the two notes sent me & forward them to you before making the cash payment; please, reply.

Yours truly,

RICHARD G. HEAD.

124 Q. Do you find any other letter in that letter book addressed to the insured?

A. Yes, sir, on page 161 dated March 28, 1905.

Q. By whom is it signed?

A. By George R. Tryner, cashier.

Q. Will you please tear that page from the book and hand it to the stenographer to be marked exhibit 21 for purposes of identification?

A. Yes, sir.

(Exhibit so marked here offered and read in evidence as follows:)

MARCH 28, 1905.

Mr. Richard Head, Las Vegas, N. M.

DEAR SIR: I have your favor of the 27th and beg to state that the notes should be sent in with the cash payment. I note what you say in regard to taking the full term of grace allowed and beg to state that that will be perfectly satisfactory provided you send in 5% interest on the cash items for the time taken.

Yours very truly,

GEO. R. TRYNER, *Cashier.*

Q. Do you find any other letter addressed to the insured in that book?

A. Yes, sir, at page 511, signed by George R. Tryner, cashier.

Q. Under what date?

A. May 1, 1905.

Q. Please tear that out and hand it to the stenographer to be marked exhibit 22 for purposes of identification?

A. Yes, sir.

(Exhibit so marked, offered and read in evidence as follows:)

MAY 1, 1905.

Mr. Rochard G. Head, Las Vegas, N. M.

DEAR SIR: I beg to remind you that May 3rd is the last day of grace in the payment of your premium on your two policies. It will be necessary for you to remit us the cash item on or before that date in order to protect your insurance.

Yours very truly,

GEO. R. TRYNER, *Cashier.*

125 By all means keep this ins. in force. Tr—

Q. Do you find any other letter to the insured in that book?

A. Yes, sir, page 538, dated May 3, 1905, signed by George R. Tryner.

Q. That is a letter addressed to the insured?

A. Addressed to the insured.

Q. Please tear that letter from the book and hand it to the stenographer to be marked exhibit 23 for purposes of identification?

A. Yes, sir.

(Exhibit so marked, is here offered and read in evidence:)

ALBUQUERQUE, N. M., May 3, 1905.

Mr. Richard G. Head, Las Vegas, N. M.

MY DEAR SIR: I have your favor dated May 2nd together with draft for \$164.00. I am at a loss to understand how you made the error of sending in only $\frac{1}{2}$ of the amount of interest required. If you will refer to your loan agreements, you will see that you have a loan of \$2,270 outstanding on each policy, and interest at the rate of 5% on this amount amounts to \$113.50. I immediately wired you stating that your remittance was \$56.75 short and requested that you send it to me at once.

I trust that you will find that I am correct in the matter and I also hope that you will mail me remittance at once so that I can report the note settlement to the company.

I also have your wire advising me that you have signed the application for paid-up policy which I trust will come in in due course.

Yours very truly,

GEO. R. TRYNER, *Cashier.*

Q. Do you find another letter addressed to the insured in that same letter book?

A. I find a letter on page numbered 560 in lead pencil, printed number 163 scratched out, which page follows page 559 in this same letter book.

Q. What is the date of that letter?

A. May 4, 1905.

126 Q. Signed by whom?

A. George R. Tryner, cashier.

Q. Will you please hand it to the stenographer to be marked exhibit 24 for the purpose of identification?

A. Yes, sir.

(Exhibit so marked, offered and read in evidence as follows: as also 24A, 24B, 24C.)

MAY 4, 1905.

Mr. Richard G. Head, Las Vegas, N. M.

DEAR SIR: I beg to acknowledge receipt of your draft for \$57.00 completing the cash payment on your policy No. 599,691 for which I enclose receipt. I also have your request for paid-up policy No. 599,690 which goes to the Home Office to-day for attention.

Yours very truly,

GEO. R. TRYNER, *Cashier.*

LAS VEGAS, N. M., May 2-'05.

Geo. R. Tryner, Cash'r, N. Y. L., Albuquerque:

Your letter first can I pay on one policy drop the other if so will remit today answer.

R. G. HEAD.
1122am.

LAS VEGAS, N. M., May 3, 1905.

George R. Tryner, Cashier, New York Life Ins. Co., Albuquerque, N. M.:

Blank application received this morning have signed name, goes to you first mail today special delivery.

RICHARD G. HEAD. 9:31am.

LAS VEGAS, N. M., May 3-'05.

George R. Tryner, Cash'r, N. Y. L., Albq.:

Have sent balance today's mail as per your wire today.

RICHARD G. HEAD. 2p.

127 Q. Does that letter book show that the page 560 numbered in pencil was pasted in having evidently been torn from another impression copy book?

A. Yes, sir.

Q. Does this page in the letter book numbered 560 in pencil follow up pages previously numbered consecutively up to page 559?

A. Yes, sir.

Q. Will you please hand the letter previously shown to you dated May 4, 1905, signed by George R. Tryner, together with the application for paid-up policy to the stenographer to be marked exhibits No. 25 and No. 26 for purposes of identification?

A. Yes, sir.

(Exhibits so marked, offered and read in evidence as follows:)

ALBUQUERQUE, N. M., May 4, 1905.

Re Policy No. 599,690, Richard G. Head.

Comptroller's Department, New York Life Ins Co.

GENTLEMEN: I beg to enclose herewith request for paid up policy 599,690 signed by Richard G. Head and Mary E. Head, insured and assignee respectively.

Kindly endorse the policy for whatever amount of paid up insurance is available and notify me in regard to the same. I am returning renewal receipt this date.

Yours very truly,

GEO. R. TRYNER, *Cashier*.
RICHARD G. HEAD.

MAY 3, 1905.

The New York Life Insurance Co. is hereby requested to endorse policy No. 599,690 for \$599,690, this being the amount of paid-up insurance payable in accordance with the terms of the policy.

RICHARD G. HEAD, *Insured*.
MARY E. HEAD,
Beneficiary Assignee.

WM. G. HAYDON, *Witness*.

To be signed by the person on whose life the policy is written and by the beneficiary or assignee. If the beneficiary or assignee is a minor the above request must be signed by a legally-appointed guardian.

128 Forwarded from New Mexico Branch Office, May 4, 1905.
G. R. TRYNOR, *Cashier*.

(Endorsed: Received May 8, 1905. Comptroller's Department.)

Q. Are you familiar with the form of notes which I now hand you, dated Las Vegas, N. M., April 3, 1905, signed Richard G. Head, Las Vegas, N. M., guardian for Richard G. Head, Jr.?

A. Yes, sir.

Q. Are you able to state whether this is the note that was given in part payment of premium on the policy in question?

A. Yes, sir.

A. State, if you know, whether or not that note was paid?

A. No, according to the records of the policy at this office, the note was not paid.

Q. Are you able to state whether or not if this note has been paid the records in your office would have shown the payment of the note?

A. They would.

Q. State whether the records show that the note was paid.

A. They do not show any payment.

Q. Will you please hand the note to the stenographer to be marked exhibit 27 for purposes of identification?

A. Yes, sir. (Exhibit so marked, offered and read in evidence as follows:)

LAS VEGAS, N. M., April 3, 1905.

Pol. No. 599,691.

On or before six months Oct. 3, after date without grace, and without demand or notice I promise to pay to the order of the New York Life Insurance Company three hundred and eighteen dollars at First National Bank, Albuquerque, N. M., value received, with interest at the rate of five per cent per annum. This is accepted by said company at the request of the maker together with one hundred and seven dollars in cash on the following agreement.

That although no part of the premium due on the third day of April, 1905, under policy 599,691, issued by said company on the life of Richard G. Head has been paid, the insurance thereunder shall be continued in force until midnight of the due date
129 of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges

hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or by laws of any state in respect to said premium and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive every other notice in respect to said premium of this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms.

\$318.00.

RICHARD G. HEAD,
Las Vegas, N. M., Guardian for Richard G. Head, Jr.

Stamped across face of this note is the word "Unpaid."

Q. Do you know whether paid-up insurance was endorsed on policy No. 599,690 in accordance with the request marked exhibit 26 or not?

A. I find on page 165 of the N. M. letter book, dated June 12, 1905, a letter addressed to Richard Head, enclosing policy No. 599,690 duly endorsed for the amount of paid-up insurance available after cancellation of the indebtedness against the policy, signed by George R. Tryner, cashier.

Q. That is Mr. Tryner's signature?

A. Yes, sir.

Q. Will you please tear that page from the letter book and hand it to the stenographer to be marked exhibit 28 for purposes of identification?

A. Yes, sir.

130 (Exhibit so marked, is offered and read in evidence as follows:)

JUNE 12, 1905.

Richard G. Head, Las Vegas, N. M.

DEAR SIR: I beg to enclose herewith policy No. 599690, duly endorsed, for the amount of paid-up insurance available on same after cancelling the indebtedness against the policy.

Yours very truly,

GEO. R. TRYNER, *Cashier.*

Q. Please state if you know where Mr. Tryner now is?

A. San Francisco.

Q. Do you know when Mr. Tryner left Albuquerque?

A. In September, 1905.

Q. Who succeeded Mr. Tryner as cashier of the New Mexico office?

A. Mr. John F. Dooley.

Q. Are you familiar with his signature.

A. Yes, sir.

Q. Please look at the copy of letter shown on page 351 of the

copy book and state whether you recognize the signature of the letter to Richard G. Head, as the signature of J. F. Dooley?

A. I do.

Q. Is that letter book one of the letter books that you received from New Mexico office when it was continued?

A. Yes, sir.

Q. Will you please tear that page 29 out and hand it to the stenographer to be marked exhibit 29 for purposes of identification?

A. Yes, sir.

(Exhibit so marked, is offered and read in evidence as follows:)

APRIL 18, 1906.

Mr. Richard Head, Las Vegas, N. M.

DEAR SIR: I am enclosing herewith your policy No. 599691 which has been closed out as per the terms of the loan agreement. I also enclose check \$56.25 refund of policy loan interest unearned.

Yours very truly,

JNO. F. DOOLEY, *Cashier.*

131 Q. Do you find any other letter addressed to Richard G. Head, in the letter books received from New Mexico office?

A. Yes, sir, at page 125.

Q. Do you recognize who signed the letter?

A. Yes, sir.

Q. Is it signed by Mr. Dooley?

A. Yes, sir.

Q. What is the date of that letter?

A. Dec. 26, 1905.

Q. Will you please tear that page from the letter copy book and hand it to the stenographer to be marked exhibit 30 for purposes of identification?

A. Yes, sir.

(Exhibit so marked, is offered and read in evidence as follows:)

DEC. 26, 1905.

Mr. Richard G. Head, Hutchinson, Kas.

DEAR SIR: Referring again to your policy No. 599691, the company have instructed me to make an offer of reducing this policy to \$2,500. In such a case they would be willing to change the policy and carry the same to April 3rd, 1905, with annual premium due on that date of \$106.25 and they would make an allowance of \$105.14 towards the payment of that premium loan on the policy would be reduced to \$567, with interest paid to April 3rd, 1906.

Don't you think you could see your way clear to reinstate your policy under these terms? What you would be required to pay at this time would be the balance of the premiums, \$1.11, and interest on same for the time past due, \$4.00, making a total of \$5.11. It would also be necessary for you to furnish the company with a full medical examination by one of the company's regular examiners.

Upon receipt of this letter I wish you would kindly advise me if

you can re-instate your policy under these terms. I dislike very much to see you lose all of the policy and the company are very anxious that you reinstate at least a portion of it.

Yours very truly,

(Signed)

JNO. F. DOOLEY, *Cashier*.
MARTIN KELLOGG.

132 Mr. PRATT: Also the deposition of J. M. CUNNINGHAM, taken at the same time, January 13th, 1908.

Direct examination by Mr. REYNOLDS:

Q. Please state your name, residence and occupation.

A. J. M. Cunningham, East Las Vegas; President of the San Miguel National Bank.

Q. Did you know Richard G. Head, Sr., during his lifetime?

A. I did.

Q. How long did you know him?

A. I think I first met him about twenty-five years ago, to the best of my recollection.

Q. Did you know him when he lived on the ranch at Watrous, New Mexico?

A. Yes, sir.

Q. Do you know how long he lived there?

A. Well, I don't know exactly, but I think I am safe in saying fifteen or sixteen years.

Q. You know, do you, that he resided at Watrous when he had the ranch there?

A. He resided on the ranch right at Watrous, yes, sir.

Q. When did he move from Watrous to Las Vegas?

A. I am not certain about that. I should say about six years ago. It may be all wrong—a year or two—but I am safe in saying about six years ago—about 1900 or 1901.

Q. Do you know whether his family resided in Las Vegas continually since he moved here?

A. You mean all of his family?

Q. I mean whether his home was in Las Vegas from the time that he moved from Watrous here?

A. Yes, sir.

Q. Where was his home during the time that you have known him?

A. When I first met him his home was some place in Colorado, but for the last 15 or 16 years, according to the best of my recollection, it was on the ranch and here in New Mexico.

(Signed)

J. M. CUNNINGHAM.

133 Also deposition of J. M. STEARNS.

Q. Please state your name, residence and occupation.

A. J. H. Stearns, East Las Vegas, New Mexico; a merchant, in business here.

Q. Did you know Richard G. Head, Sr., during his lifetime?

A. Some of his lifetime.

Q. How long did you know him?

A. Well, I cannot say as to that; ten or twelve years, perhaps.

Q. Where did he live when you first knew him?

A. He was living at Watrous when I first knew him.

Q. That is in New Mexico?

A. Yes, sir, Watrous, New Mexico.

Q. Did you have any dealings with him when he lived there?

A. Latterly, I did.

Q. Do you know when he moved from there to Las Vegas?

A. No, I do not.

Q. Do you know that he did move his family from Watrous to Las Vegas?

A. I do not know that he moved his family from Watrous to Las Vegas, but I do know he lived at Watrous at one time and then at Las Vegas, but whether or not he moved from Watrous to Las Vegas I do not know as to that.

Q. Where was his home during the time that you knew him, after he left Watrous?

A. Here in Las Vegas.

Q. And he was a resident of Las Vegas during the time that you knew of his living here?

A. Yes, I presume that he was a resident here; he was not here all the time.

Q. His family lived here?

A. Yes, his family lived here.

(Signed)

J. H. STEARNS.

Also deposition of T. W. HAYWARD.

Q. Please state your name, residence and occupation.

A. Thomas W. Hayward; 1132 Grand Avenue, East Las Vegas; merchant.

Q. Did you know Richard G. Head, Sr., during his lifetime?

A. I did.

134 Q. How long did you know him?

A. Twenty odd years.

Q. How long did he live in New Mexico prior to his death?

A. Nearly all the time so far as I recollect; he went to Hutchinson, Kansas, I believe, and was there for—don't know whether he was there over a year or not—not quite sure about that.

Q. While he was at Hutchinson was his family here in Las Vegas?

A. I am not quite sure. Mrs. Head went back awhile, but I am not sure—the residence I think was here.

Q. You knew him when he lived at Watrous, New Mexico?

A. I knew him well.

Q. Do you know when he moved from Watrous to Las Vegas?

A. I could not tell exactly. I do not know how long he lived in — Vegas—I suppose somewhere—I don't know, time passes so quick, it might have been five years or more.

Q. During all of the time that you knew him, aside from the time he was in Hutchinson, his residence was here in New Mexico?

A. I believe so.

Q. And his family lived here in New Mexico while he was at Hutchinson?

A. Unless Mrs. Head went back the first part; that I am not sure. It strikes me that Mrs. Head went back to make her residence with him for a while—I don't know. Not know the movement of the family about that time. I could not swear about that, but I think she went back, to my recollection, and intended to live there. That is what I heard, but how far that is so, I do not know, but since his death I know Mrs. Head has been here since that time. How long she stayed there I do not know.

(Signed)

THOMAS W. HAYWARD.

And the above and foregoing was all of the evidence offered and received on the trial of said cause, and both parties rested their cause.

135 Thereupon the plaintiff requested the court to give, and instruct itself, sitting as a trier of the facts in said cause, the following instruction and declaration of law:

1.

The court instructs the court sitting as a jury that on the undisputed facts in the case as they appear from the evidence, the policy of insurance in this action was and is a Missouri contract governable by the laws of Missouri in force at the time of the issuance of said policy, and not governable by the laws of the state of New York.

To which instruction the defendant objected, among other reasons for the reason that to apply the Missouri statute and laws to the insurance contract in this cause violates and is in contravention of the rights of defendant under article 1, section 10 of the Constitution of the United States and the 14th amendment thereof and also in violation of sections 15 and 30 of article 2 of the Constitution of Missouri, which objection was by the court overruled, and said instruction given, to which action, ruling and decision of the court in overruling said objection and giving said instruction, the defendant then and there duly excepted.

And the plaintiff also requested the court to give and instruct itself sitting as a trier of the facts in this cause, the following instruction and declaration of law:

2.

The Court instructs the court sitting as a jury that on the facts shown in evidence in this case the plaintiff is entitled to recover and that the issues on the pleadings herein should be found in favor of the plaintiff and against the defendant.

To which instruction the defendant duly objected, among
136 other reasons, for the reason that to apply the Missouri statute and laws to the insurance contract in this cause would violate and be in contravention of the rights of defendant under article 1, section 10, of the Constitution of the United States and the 14th

amendment thereof and also in violation of sections 15 and 30 of article 2 of the Constitution of Missouri, which objection was by the court overruled, and said instruction given, to which action, ruling and decision of the court in overruling said objection, and giving said instruction, the defendant then and there duly excepted.

And the plaintiff also requested the court to give and instruct itself sitting as a trier of the facts in this cause, the following instructions:

3.

The court instructs the court sitting as a jury that the policy sued on in this action was kept alive by the laws of Missouri to a time subsequent to the death of Richard G. Head, Sr., by the net value of said policy at the time of his default in 1905, and that the plaintiff is entitled to a finding and judgment herein against defendant for the amount of said policy, to-wit, \$10,000, less the amount of \$2,270 with interest, and less the further sum of \$318 and \$425 due for premiums, with interest, and that after deducting from said \$10,000 the principal and interest of said three amounts, and computing interest on the balance at six per cent per annum from July 6, 1906, to the day of the finding and judgment herein, the finding and judgment should be for such balance with interest computed as aforesaid.

To which instruction and declaration of law the defendant duly objected, among other reasons, for the reason that to apply the Missouri statute and laws to the insurance contract in this cause would violate and be in contravention of the rights of defendant under article 1, section 10 of the Constitution of the United States and the 14th amendment thereof and also in violation of sections 15 and 30 of article 2 of the Constitution of Missouri, which objection the court overruled, and gave said instruction, to all of which ruling, action and decision of the court in overruling said objection and giving said instruction, the defendant then and there duly excepted.

And thereupon the defendant asked the court to give the following instruction and declare the law to be:

I.

The court declares the law to be that under the undisputed evidence in this case, the plaintiff herein is not entitled to recover any sum in excess of the amount tendered by the defendant, the sum being the face of the paid up policies tendered the plaintiff before this suit was instituted.

To which instruction and declaration of law the plaintiff duly objected, which objection was by the court sustained, and said instruction refused, to which action, ruling and decision of the court in sustaining said objection and refusing to give said instruction and declaration of law, the defendant then and there duly excepted.

And the defendant further requested the court to give the following instruction and declare the law to be:

II.

The court declares the law to be that the terms of the loan agreement entered into between the parties hereto in 1904, and offered in evidence, controls and determines the amount the plaintiff should recover in this case.

To which instruction and declaration of law the plaintiff duly objected, which objection was by the court sustained, and said instruction refused, to which action, ruling and decision of the court in sustaining said objection and refusing to give said instruction and declaration of law, the defendant then and there duly excepted.

138 And said cause thereupon remained pending in said court and with said court, under advisement, until on the fifty-third day of the April term, 1908, thereof, and to-wit, on Saturday, June 13th, 1908, when the court made its findings and entry of record as follows:

53rd Day, April Term, 1908.

SATURDAY, *June 13th*, 1908.

"Now again came the said parties and this cause is submitted to the court for trial on the pleadings and the evidence, a jury being waived by consent of the parties. Thereupon the cause is submitted to the court on the pleadings and evidence and argument of counsel and the court having duly considered the same and all and singular the premises being seen and heard by the court, the court finds the issue in favor of the plaintiff, and that the defendant is indebted to the plaintiff and the plaintiff is entitled to recover of defendant the sum of seven thousand seven hundred and twenty-five dollars and fifty hundredths dollars (\$7,725.50).

Wherefore all and singular the premises being seen and heard, it is considered, ordered and adjudged by the court that the plaintiff, Richard G. Head, Jr., by B. F. Deatherage, his next friend, have and recover from and have judgment against the defendant, the New York Life Insurance Company, a corporation, for said sum of seven thousand seven hundred and twenty-five and fifty one hundredths dollars (\$7,725.50) together with plaintiff's costs in this behalf laid out and expended and that execution issue therefor. This judgment bears interest at the rate of six per cent from this date."

To all of which the defendant then and there duly excepted.

And said cause still remained pending in said court until on the fifty-sixth day of the April term, 1908, thereof, towit, on June 17th, 1908, and being within due and proper time, said defendant filed its motions, in arrest of judgment and for a new trial, and which said motions in arrest of judgment and for a new trial are in words and figures as follows:

Motion in Arrest of Judgment.

Now on this day comes the defendant and moves the court to arrest judgment in the above entitled cause for the following reasons, to-wit:

1. Because upon the entire record, the verdict and judgment should have been in favor of defendant instead of in favor of plaintiff.
2. Because on the pleadings and evidence the finding and judgment should have been in favor of defendant instead of in favor of plaintiff.
3. Because the evidence does not support the verdict in the above entitled cause.
4. Because the verdict and judgment are not responsive to the issues made by the pleadings.
5. Because said verdict and judgment are irregular, defective and contrary to law.

Motion for New Trial.

Now on this day comes defendant and moves the court to set aside its findings and judgment rendered in the above case and grant defendant a new trial of said cause for the following reasons, to-wit:

1. Because said findings and judgment are against the evidence.
2. Because said findings and judgment are against the weight of the evidence.
3. Because said findings and judgment are against the law.
4. Because said findings and judgment are against the law and the evidence.
5. Because said findings and judgment are for the wrong party.
6. Because said court erred in admitting against the objections of defendant, incompetent, irrelevant and immaterial evidence offered in behalf of plaintiff.
7. Because the court erred in refusing to admit competent, relevant and material evidence offered in behalf of defendant.
8. Because the court erred in its construction of the contract of insurance and in its construction of the loan agreement introduced in evidence.
9. Because the court erred in giving, over the objections of defendant, the instructions or declarations of law and each of them asked by the plaintiff.
10. Because the court erred in refusing to give the declarations of law and each of them asked and requested by defendant.
11. Because the court erred in holding that the insurance contract in controversy was governed by the laws of the State of Missouri as they existed at the time said contract of insurance was made and entered into between parties neither of whom were citizens of the State of Missouri.
12. Because the court erred in that by its ruling and holding that said contract of insurance was governed by laws of the State of Mis-

souri as said laws existed at the time said contract of insurance was executed notwithstanding the fact that none of the parties to said contract were residents or citizens of the State of Missouri, the court invaded and deprived this defendant of the rights guaranteed it under the Constitution of the United States of America and especially its rights under Article 1, Section 10 of said constitution and Section 1 of Article XIV of the amendments of the constitution.

13. Because the court erred in ruling and holding that the loan agreement introduced in evidence, in respect to its terms, conditions and provisions thereof, did not control in respect to its said terms and conditions the rights of the parties to this controversy, but found and adjudged the merits in this case upon the face of the original contract of insurance and the statutes of the state of Missouri as they existed at the time said original contract of insurance was written and without regard to the terms and provisions of said loan agreement, notwithstanding the fact that said loan agreement was entered into between citizens and residents of states other than Missouri and was made, executed and delivered outside of the state of Missouri; and by so holding and ruling, the court invaded

141 and deprived this defendant of its right under the Constitution of the United States of America and especially under article 1, section 10 of said Constitution and section 1 of article XIV of the amendments to the constitution.

14. Because by its holding and ruling that section 5856 of the Revised Statutes of Missouri for the year 1889 (being the statute in force at the time said original contract of insurance was entered into) governed and controlled the agreement of the parties to said contract of insurance and the parties to this controversy the court erred.

15. Because said section 5856 of the Revised Statutes of Missouri for the year 1889, if intended and held to apply to contract of the kind in controversy, entered into under circumstances and between parties to said contract in this case, is unconstitutional and void and contrary to the provisions of the Constitution of the United States of America and particularly Article 1, Section 10 of said constitution and Section 1 of Article XIV of the amendments to the constitution.

16. Because the finding and judgment are excessively large and for an amount not justified by the evidence.

17. Because under the entire record and pleadings and evidence the finding and judgment of the court should have been in favor of defendant instead of in favor of plaintiff.

18. Because said verdict and ruling are otherwise irregular, defective and contrary to law.

And said cause still remained pending in said court until on the sixty-fifth day of the April term thereof, 1908, and on to-wit, June 27th, 1908, when said motions coming on to be heard before the court, and the same being duly argued by counsel and considered by the court, were by the court overruled, to which action, ruling and decision of the court, in overruling said motions, and not arresting judgment and granting a new trial herein, and to all and singular thereof, the defendant then and there duly excepted.

142 And said cause being pending in said court, when on the eighty-third day of said April term thereof, 1908, and on to-wit, July 23rd, 1908, when defendant filed its application for an appeal which is in words and figures as follows:

Affidavit and Application for Appeal.

O. W. Pratt, of lawful age, being duly sworn, on his oath says that he is an attorney and agent of and for New York Life Insurance Company, the defendant in the above entitled cause; that he makes this affidavit and application for and in behalf of said defendant; that judgment has been rendered in and by this court in favor of the plaintiff in said cause and against said defendant; that said defendant appeals from said judgment and decision of this court to the Supreme Court of the State of Missouri; that said appeal is not made for vexation or delay but because the affiant believes that the appellant, the said defendant, is aggrieved by said judgment and decision of this court and said defendant prays and affiant prays on behalf of said defendant that said appeal be granted and allowed. Said defendant herewith tenders the sum of \$10.00 docket fee as by law required.

O. W. PRATT.

Subscribed and sworn to before me this 24th day of July, 1908.
My commission will expire Sept. 15, 1908.

THOMAS H. REYNOLDS,
*Notary Public within and for
Jackson County, Missouri.*

And upon which the court ordered the following entry to be made as follows:

Eighty-third Day of April Term, 1908.

SATURDAY, July 23rd, 1908.

143 Now defendant makes application and files affidavit for appeal from the judgment of this court upon exhibit of receipt showing the payment to the clerk of this court of the sum of ten dollars docket fee in the appellate court, the court sustains said application and allows an appeal to the Supreme Court of the State of Missouri as prayed.

Now the court fixes defendant's appeal bond in the sum of thirteen thousand (\$13,000) dollars and defendant is by the court given until on or before ten days from the adjournment of this term of court in which to file said appeal bond, and until on or before the third day of the October, 1908, term of court in which to file said bill of exceptions herein.

And on October 12th, 1908, it being the first day of the October term of this court, the court, for good cause shown, entered its order allowing the defendant until on or before the 3rd day of the January term, 1909, to file its bill of exceptions herein.

And on the 12th day of January, 1909, it being the 2nd day of

the January term, 1909, the court, for good cause shown, entered its order allowing the defendant until on or before the 3rd day of the April term, 1909, of this court, to file its bill of exceptions.

And on April 13th, 1909, it being the first day of the April term of this court, the court, for good cause shown, entered its order allowing defendant until on or before June 1st, 1909, to file its bill of exceptions and at the said April term, 1909, of this court, and on the 29th day of May, 1909, this court, for good cause shown, entered its order allowing the defendant time until the 15th day of June, 1909, to file its bill of exceptions herein.

And at the said April term, 1909, of this court, and on June 14th, 1909, this court, for good cause shown, entered its order allowing the defendant until July 1st, 1909, to file its bill of exceptions herein.

144 And on the 29th day of June, 1909, and during the April term of this court, this court, for good cause shown, entered its order allowing the defendant until on or before the first day of November, 1909, to file its bill of exceptions herein.

Wherefore the said defendant prays the court to settle and allow its bill of exceptions to all and singular, the acts, rulings, decisions and orders of the court in the premises, and that the same may be signed and made a part of the record in this cause.

Now, therefore, the court being fully advised in the premises, doth find the foregoing to be a correct bill of exceptions in this cause, taken and saved on behalf of defendant herein, and doth now sign the same and order that the same be made a part of the record in this cause.

Given under the hand of the judge of said court before whom said proceedings were had, on this 22nd day of October, A. D. 1909.

J. H. SLOVER,

*Judge of the Circuit Court of Jackson
County, Missouri, Division No. 6.*

We hereby consent that the foregoing may be taken to be a correct bill of exceptions on the part of the defendant herein.

BOTSFORD, DEATHERAGE & CREASON,

Attorneys for Plaintiff.

Oct. 8, 1909.

145

Index.

Pleadings:	Pages.
Petition—	1- 7
Petition—Second Count	4- 7
Answer—First Count	8- 13
Answer—Second Count	13- 19
Policy Loan Agreement	18- 19
Reply	20
Record Entries	20- 21
Bill of Exceptions:	
Magill, B.	22- 26
Application 599,690	33- 39
Policy	27- 39

Anderson, A. E., Deposition (portion).....	40- 41
Anderson, A. E., Deposition.....	42- 48
Anderson, Exhibit B.....	47- 48
Deatherage, B. F.....	48
Letter of April 23, 1906.....	49- 50
Proofs of Death.....	50- 51
Letter of 5-2-'99.....	55
Petition Appointing Next Friend.....	57
Letter of April 18, 1906.....	61
Receipt May 4, 1905.....	62- 63
Reynolds, Joseph B.....	63- 67
Head, Mary E.....	58- 63
Certificate Supt. Ins. Missouri.....	40
Probate Record, Mora Co., N. M.....	80- 83
Head, Mary E., Cross-Examination.....	91
Plaintiff Rests.....	67
Demurrer to Evidence by Defendant.....	67
McIntosh, Jas. A., Deposition.....	67- 70
McIntosh, Exhibit A.....	70
McIntosh, Exhibit B.....	70- 72
Grow, A. R., Deposition.....	72- 74
Wilcox, B. T., Deposition.....	74- 76
Wilcox, Exhibit A.....	76- 80
146 Reynolds, J. B., (for Plaintiff).....	63- 67
Guardian's Bond and Oath.....	83- 84
Policy Loan Agreement.....	91- 93
Kellogg, Martin, with Exhibits, Deposition.....	93-125
Cunningham, J. M., Deposition.....	126
Stearns, J. H., Deposition.....	127
Hayward, T. W., Deposition.....	127-128
Instructions, Plaintiff.....	129-130
Instructions, Defendant.....	131
Verdict and Judgment.....	132
Motion—Arrest Judgment.....	133
Motion—New Trial.....	133-135
Affidavit and Application Appeal.....	136
Certificate.....	136-138

147 And thereafter, to-wit, on the 19th day of October, 1911,
the Court made and entered of record the following, to-wit:

15063.

R. G. HEAD, by, &c., Resp.,
vs.
N. Y. LIFE INS. CO., App.

Come now the said parties by attorney, and after arguments
herein, submit this cause to the Court.

And thereafter, to-wit, on the 29th day of November, 1911, the
Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, JR., by B. F. DEATHERAGE, His Next Friend,
Resp.,

vs.

NEW YORK LIFE INS. COMPANY, App.

Appeal from Circuit Court of Jackson County.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson County Circuit Court rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant his costs and charges herein expended, and have therefor, execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

148 In the Supreme Court of Missouri, Division No. One.

15063.

RICHARD G. HEAD, JR., by Next Friend, Respondent,

vs.

NEW YORK LIFE INSURANCE COMPANY, Appellant.

Statement.

The facts in this case are substantially the same as the facts in 15062 with this exception, that the plaintiff in this case was the direct beneficiary under the policy as it was originally drawn.

For the reasons given in extenso in the former case, the judgment in this case is affirmed.

HENRY W. BOND,
Commissioner.

Per Curiam:

The foregoing opinion of Bond, Com'r, is adopted as the opinion of the Court, all the Judges concur except Graves, P. J., who dissents.

149 And thereafter, to-wit, on the 6th day of December, 1911, the appellant filed its motion and application to transfer to Court in Banc, which said motion and application is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri, October Term, 1911,
Div. No. 1.

15063.

RICHARD G. HEAD, by His Next Friend, Respondent,
vs.
NEW YORK LIFE INSURANCE COMPANY, Appellant.

Now on this day comes New York Life Insurance Company the appellant in the above entitled cause and states that one of the Judges of Division No. one of this Court dissents from the opinion rendered in and by said division in the above entitled cause affirming the judgment of the Circuit Court of Jackson County, Missouri, in said cause; that this appellant is the losing party in said cause and that a Federal question is involved in said cause.

Wherefore, this appellant applies for an order and prays that an order be granted transferring said cause from said division No. 1 of the Court to the Court in Banc for its decision.

NEW YORK LIFE INSURANCE COMPANY,
Appellant,
By LATHROP, MORROW, FOX & MOORE AND
CYRUS CRANE,
Its Attorneys.

Notice.

To Botsford, Deatherage & Creason, Attorneys for Respondent in the above entitled cause, being cause entitled "Richard G. Head, by his next friend, Plaintiff, vs. New York Life Insurance Company," No. 15063:

150 You are hereby notified that the New York Life Insurance Company, the appellant in the above entitled cause, will, on December 6th, 1911, file in Division No. 1 of the Supreme Court of the State of Missouri its application for an order transferring said cause from said Division No. 1, of said Supreme Court to the Court en banc.

NEW YORK LIFE INSURANCE COMPANY,
Appellant,
By LATHROP, MORROW, FOX & MOORE AND
CYRUS CRANE,
Its Attorneys.

Service of the above notice and receipt of a copy of the above and foregoing motion are hereby acknowledged this 5th day of December, 1911, at 10.30 o'clock A. M.

BOTSFORD, DEATHERAGE & CREASON,
*Attorneys for Richard G. Head, by His Next
Friend, Respondent in the Above-entitled Cause.*

And thereafter, to-wit, on the 6th day of December, 1911, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, by, &c., Respondent,
vs.
N. Y. LIFE INSURANCE Co., Appellant.

Comes now the said appellant, by attorney, and files its motion to transfer this cause to the Court in Banc.

And thereafter, to-wit, on the 23rd day of December, 1911, the Court made and entered of record the following, to-wit:

151

15063.

RICHARD G. HEAD, by, &c., Respondent,
vs.
N. Y. LIFE INS. Co., Appellant.

Now, at this day, the Court having considered and fully understood the motion to transfer this cause to the Court in Banc, doth order that the said motion be sustained, and the said cause transferred to the Court in Banc.

And thereafter, to-wit, on the 19th day of January, 1912, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, by, &c., Respondent,
vs.
N. Y. LIFE INS. Co., Appellant.

Come now the said parties, by attorney, and after arguments herein, submit this cause to the Court.

And thereafter, to-wit, on the 1st day of March, 1912, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, by, &c., Respondent,
vs.
N. Y. LIFE INS. Co., Appellant.

Appeal from Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of

and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County, rendered, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellant his costs and charges herein expended and have execution therefor. (Opinion filed.)

152 Which said opinion is in words and figures as follows, to-wit:

153 The following opinion by Bond, C., delivered in Division No. I, is adopted as the opinion of the Court in Banc, all concur except Graves and Ferriss, JJ., who dissent.

In the Supreme Court of Missouri, Division No. One.

15063.

RICHARD G. HEAD, JR., by Next Friend, Respondent,

vs.

NEW YORK LIFE INSURANCE COMPANY, Appellant.

Statement.

The facts in this case are substantially the same as the facts in 15062 with this exception, that the plaintiff in this case was the direct beneficiary under the policy as it was originally drawn.

For the reasons given in extenso in the former case, the judgment in this case is affirmed.

HENRY W. BOND,
Commissioner.

Per Curiam:

The foregoing opinion of Bond, Com'r, is adopted as the opinion of the Court, all the Judges concur except Graves, P. J., who dissents.

154a And thereafter, to-wit, on the 9th day of March, 1912, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, Respondent,

vs.

NEW YORK LIFE INS. Co., Appellant.

Comes now the said appellant by attorney, and files herein motion for rehearing.

Which said motion for rehearing is in words and figures as follows, to-wit:

154 In the Supreme Court of the State of Missouri. En Banc.
15063.

RICHARD G. HEAD, by His Next Friend, Respondent,
vs.
NEW YORK LIFE INSURANCE COMPANY, Appellant.

Now comes appellant and prays the Court to re-hear and reconsider this cause for the following reasons:

(1.) Questions decisive of this case and duly submitted by counsel, have been overlooked by the court.

(2.) The decision of the Court in this cause is in conflict with the Constitution of the United States and controlling court decisions.

We have heretofore shown that the judgment of the lower court in this case cannot be affirmed by this Court without impairing the contract contained in the loan agreement. The only answer to this contention which we find in the opinion rendered in this cause is to the effect that the loan agreement was a "subsidiary" contract. This Court's opinion seems to have proceeded upon the theory that a contract may be impaired if it is called "subsidiary." The cases cited in support of the majority opinion are cases where not only the original contract, but the loan agreements also, were really executed within and subject to the laws of this state. The fact that in this case the loan agreement was executed without the State of Missouri is, of itself, a sufficient reason why the loan agreement is not subsidiary; for if the Missouri statute is read into the original contract of insurance, it cannot be said that a later valid contract, which ignores the Missouri statute, is a subsidiary agreement. If the decision and opinion of the majority of this Court is sound law, it means that a contract entered into in this state cannot, so far
155 as it is affected by the statutes of this state, be modified by a subsequent agreement made without the state. We submit that such a rule would be violative of settled principles of law, as well as our constitutional provisions in regard to the liberty of contract.

In the majority of opinion of the court we find no reference to our contention that the loan agreement in question was specifically authorized by the Probate Court of the Territory of New Mexico, and its force, effect and validity could not be questioned by the Courts of this state. This point seems to have been entirely overlooked by the Court.

Respectfully submitted,
LATHROP, MORROW, FOX & MOORE,
Attorneys for Appellant.

Copy received March 8th, 1912.
BOTSFORD, DEATHERAGE AND CREASON,
For Respondents.

And thereafter, to-wit, on the 11th day of March, 1912, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, Respondent,
vs.
NEW YORK LIFE INSURANCE Co., Appellant.

Comes now respondent, and by attorney, files its suggestions in reply to appellant's motion for a rehearing, herein.

And thereafter, to-wit, on the 11th day of March, 1912, the Respondent filed its suggestions in opposition to appellant's motion for a rehearing, which said suggestions are in words and figures as follows, to-wit:

156 In the Supreme Court of Missouri, En Banc.

15063.

RICHARD G. HEAD, Respondent,
vs.
NEW YORK LIFE INSURANCE COMPANY, Appellant.

Suggestions of Respondents in Reply to Appellant's Motion for Rehearing in the Above Cause.

We submit that no question- in this case have escaped the attention or determination of the court in its judgment in this case, or that any questions have been overlooked by the Court. The case was fully argued before the Court sitting en banc, more than the full time allowed by the rules having been taken by counsel for that purpose. The decision of the court in each of these cases to the effect, that the loan agreements having been fully contained in the original policies, the law of the policies as it existed when the policies containing the loan agreements were issued, governs the loans thereafter made, was fully considered, first in the arguments in Division 1 of this Court, and was fully considered in the opinions therein given, and was finally argued and considered in the Court E. Banc, and the solemn decisions of this Court in these cases being in harmony with the Cravens and Smith cases, and, on this point, especially in harmony with the case of Burrigide v. New York Life Insurance Co., 211 Mo. 158, nothing really remains for consideration on this motion for rehearing. The parties could not make a new law governing the contract, when they came to make the loans, in accordance with the terms and conditions of the policies.

157 It is immaterial where the loans were made. The loans wherever made, were made pursuant to and in execution of the policies.

If two parties, as mortgagor and mortgagee, make a chattel mortgage on chattles in Missouri, which is usurious and therefore void under our usury statute, they could not make that chattle mortgage valid by a subsequent renewal of the chattle mortgage, even though

the renewal was written up in Kansas, or New Mexico, or New York or Massachusetts. And if parties were to make a new and second chattle mortgage in the case above instanced, this court would not, while holding the original mortgage invalid as being usurious and void under the laws of Missouri, at the same time hold that the subsequent mortgage was valid under the laws of Missouri because made in another state. Both mortgages in that case would be held as having been made with reference to the laws of Missouri. In that case, the second mortgage would, in a sense, be a new and separate undertaking.

But in the case at bar, the loan contract subsequently made was made in execution of the policy and was carrying out the contract of the parties, which contract was made in and governable by the laws of Missouri as a part of the contract. The effect of the authorization of the probate court of New Mexico, in the case of the infant, Richard Head, was simply to authorize his guardian to do what the infant could have done if he had been of the age of majority. It had that effect and none other. It did not make either the policy or the loan therein provided for a New Mexico or a New York contract.

The point of paid up insurance and extended insurance referred to in appellant's motion at the conclusion of its motion in the Mary E. Head case, was fully argued at the oral argument and considered by your Honors in the affirmance of the judgment of the trial court. We submit that each motion for re-hearing should be over-ruled.

Respectfully submitted,

BOTSFORD, DEATHERAGE & CREASON,

Attorneys for Resp.

158 And thereafter, to-wit, on the 28th day of March, 1912, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, Respondent,

vs.

NEW YORK LIFE INSURANCE Co., Appellant.

Now at this day, the Court having seen and fully understood the appellant's motion for a rehearing herein, doth consider that the motion be and it is hereby overruled.

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the above entitled cause and also of the opinions of the Court rendered therein as fully as the same appear of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court. Done at office in the City of Jefferson this 2nd day of May, A. D. 1912.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*

159 And thereafter, to-wit, on the 13th day of April, 1912, the Court made and entered of record the following, to-wit:

15063.

RICHARD G. HEAD, Respondent,
vs.
NEW YORK LIFE INSURANCE COMPANY, Appellant.

Appeal from Circuit Ct. Jackson Co.

Now at this day there is presented to the Hon. Henry Lamm, Acting Chief Justice of the Supreme Court of the State of Missouri, in chambers, a petition for a writ of error to the Supreme Court of the United States, a citation directed to the said respondent citing and admonishing him to appear before the Supreme Court of the United States on the thirteenth day of May, 1912, an assignment of errors and a bond in the sum of sixteen thousand (\$16,000) dollars. Which said writ of error is allowed, said citation signed and issued, said assignment of errors filed and said bond approved made a part of the record herein.

Which said petition for writ of error and allowance thereof, assignment of errors, citation and bond are in words and figures as follows, to-wit:

160

Copy.

UNITED STATES OF AMERICA,
State of Missouri:

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
RICHARD G. HEAD, JR., by Next Friend, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Missouri:

The petition of the New York Life Insurance Company respectfully shows that on the 1st day of March, 1912, the Supreme Court of the State of Missouri rendered a final judgment against your petitioner, the New York Life Insurance Company, in a cause wherein New York Life Insurance Company was appellant and Richard G. Head, Jr., was respondent, affirming the judgment of the lower court against your petitioner for the sum of Seven Thousand Seven Hundred Twenty-five and 50/100 Dollars (\$7,725.50) with interest and costs, as will appear by reference to the record and proceedings in said cause; that the Supreme Court of the State of Missouri is the highest court of that state in which a decision in said cause could be had, and your petitioner claims the right to remove said judgment to the Supreme Court of the United States by

virtue of a writ of error under Section 709 of the Revised Statutes of the United States, because your petitioner claims that the said judgment and decision of said Supreme Court of Missouri deprives your petitioner of a right, title, privilege and immunity under

Article I, Section 10 of the Constitution of the United States
161 and the Fourteenth Amendment of said Constitution, all of which fully appears from the records of the proceedings in said cause which is herewith submitted.

Your petitioner further states that it believes that it has been aggrieved by the judgment of the Supreme Court of the State of Missouri in that it has been denied rights, privileges and immunities guaranteed it by the Constitution of the United States as aforesaid all as more particularly set forth in the Assignments of Error which are filed herewith.

Wherefore, your petitioner prays an allowance of a writ of error returnable into the Supreme Court of the United States and for citation and supersedeas.

And your petitioner will ever pray, etc.

NEW YORK LIFE INSURANCE COMPANY,
By CYRUS CRANE AND
LATHROP, MORROW, FOX & MOORE,
Its Attorneys.

Let the Writ of Error issue as prayed April 13, 1912.

(Signed)

HENRY LAMM,
*Presiding Judge of the Supreme
Court of Missouri, en Banc.*

162 UNITED STATES OF AMERICA,
State of Missouri:

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
RICHARD G. HEAD, JR., by Next Friend, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error above named and respectfully shows that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in this cause there is manifest error in this, to-wit:

1. Because the Supreme Court of the State of Missouri denied to the plaintiff in error a right, privilege and immunity to which it is entitled and which is guaranteed to it under and by Section 10 of Article I of the Constitution of the United States and under and by Section 1 of Article XIV of the amendments thereof in that the Supreme Court of the State of Missouri by its ruling and decision in said cause held that the contract of insurance sued upon and which was the basis of the action, was governed as to the amount due thereunder by the laws of the State of Missouri as said laws existed at the time said contract of insurance was executed and not

by the terms of the written contract of insurance, notwithstanding the fact that neither the plaintiff in error, who was defendant in said action, nor any of the other parties to said contract nor any persons beneficially interested therein were residents or citizens of the State of Missouri at the time said contract was entered into nor at any time thereafter and also notwithstanding that the parties to said contract of insurance expressly agreed and wrote into said contract that the said contract should be governed and construed by and under the laws of the State of New York, of which state this plaintiff in error is and was a resident and citizen.

2. Because the Supreme Court of the State of Missouri erred in its holding and decision and in its opinion, and particularly in paragraph 4 thereof, that the loan agreement which formed part of the entire contract of insurance sued upon in this action and the terms of which constituted a defense to this said action, was void and inoperative so far as the same was in conflict with the laws and statutes of the State of Missouri as they existed at the time the original policy of insurance was issued, notwithstanding the fact that neither of the parties to said loan agreement (who are also parties to this said action) were residents or citizens of the State of Missouri at the time said loan agreement was entered into, nor at any time prior thereto, nor at any time thereafter, and notwithstanding the fact that said loan agreement was made, executed and delivered outside of the jurisdiction and territorial limits of the State of Missouri, and by so ruling and holding, the Supreme Court of the State of Missouri denied the plaintiff in error a right, privilege and immunity to which it is entitled and which is guaranteed to it under and by Section 10 of Article I of the Constitution of the United States and under and by Section 1 of Article XIV of the amendments thereto.

3. Because the Supreme Court of the State of Missouri deprived the plaintiff in error of a right and immunity to which it was entitled under Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment of said Constitution; (A) by refusing to hold that the Circuit Court of Jackson County, Missouri, in the trial of this cause, committed error in giving the following instructions declared by the trial court to be the law in this case, over the objections of the plaintiff in error, made orally at the time, that to apply the Missouri statutes and laws to the insurance contract in question, "would violate and be in contravention of plaintiff in error's rights under Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment of said Constitution":

(a) The court instructs the court sitting as a jury that on the uncontradicted facts of the case as they appear from the evidence, the policy of insurance in this action was and is a Missouri contract governable by the laws of Missouri in force at the time of the issuance of said policy, and not governable by the laws of the state of New York.

(b) The court instructs the court sitting as a jury that on the facts shown in evidence in this case the plaintiff is entitled to recover

and that the issues on the pleadings herein should be found in favor of the plaintiff and against the defendant.

(c) The court instructs the court sitting as a jury that the policy sued on in this action was kept alive by the laws of Missouri to a time subsequent to the death of Richard G. Head, Sr., by the net value of said policy at the time of his default in 1905, and that the plaintiff is entitled to a finding and judgment herein against defendant for the amount of said policy, to-wit, \$10,000, less the amount of \$2,270 with interest, and less the further sum of \$318 and \$425 due for premiums, with interest, and that after deducting from said \$10,000 the principal and interest of said three amounts, and computing interest on the balance at six per cent per annum from July 6, 1906, to the day of the finding and judgment herein, the finding and judgment should be for such balance with interest computed as aforesaid.

And (B) by erroneously holding that the said trial court did not commit error when it refused to sustain objections to the introduction of evidence, made orally by plaintiff in error at the time of the trial of this cause, based on the ground that to admit such evidence was in violation of the rights of plaintiff in error under the sections of the Constitution and amendments thereto above mentioned.

4. Because the Supreme Court of the State of Missouri
165 deprived plaintiff in error of a right and immunity to which it was entitled under Section 10 of Article I of the Constitution of the United States and of the fourteenth amendment thereto in refusing to give the following instructions requested by the plaintiff in error.

(a) The court declares the law to be that under the undisputed evidence in this case, the plaintiff herein is not entitled to recover any sum in excess of the amount tendered by the defendant, the sum being the face of the paid-up policies tendered the plaintiff before this suit was instituted.

(b) The court declares the law to be that the terms of the loan agreement entered into between the parties hereto in 1904, and offered in evidence, controls and determines the amount the plaintiff should recover in this case.

5. Because the holding of the Supreme Court of the State of Missouri, as shown by that portion of its opinion hereafter in this paragraph set forth, impairs the obligation of a contract contrary to Article I, Section 10 of the Constitution of the United States and deprives plaintiff in error of its liberty of contract and property without due process of law in contravention of and in violation of the Fourteenth Amendment of said Constitution in that the Supreme Court of this state does thereby declare the policy loan agreement to be subject to the laws and statutes of the State of Missouri notwithstanding said loan agreement was made, executed and delivered wholly without the jurisdiction and territorial limits of the State of Missouri and that by said holding and ruling of the Supreme Court of Missouri the plaintiff in error was and is denied the right to alter or modify an original policy of insurance by an agreement entered into outside the territorial limits of the State of Missouri, notwith-

standing, also, neither this plaintiff in error nor any of the parties or beneficiaries to or of said original policy of insurance and said loan agreement were or ever have been residents or citizens of the State of Missouri:

166 "We have held that this policy by original legal intend-
ment was a Missouri Contract and to be wholly governed,
construed and controlled by the laws of this state, and that
it is neither modified nor altered by the written agreement entered
into at the time of the loan made in 1904. It necessarily follows
that neither the tender nor payment (if it had been received) of the
\$89.00 would preclude the beneficiary from enforcing her rights
under this contract according to the laws of Missouri if \$89.00 was
not all of the sum unquestionably due her at the time."

6. Because the Supreme Court of Missouri in its opinion and
statement of the cause failed to note and pass on the constitutional
rights urged by plaintiff in error and in such action plaintiff in error
asserts and submits that its constitutional rights, privileges and im-
munities have been denied, to-wit: The obligation of the contract
of insurance and policy loan agreement have been impaired con-
trary to Article I, Section 10 of the Constitution of the United States,
and plaintiff in error has been deprived of its liberty of contract and
property contrary to the Fourteenth Amendment of said Constitu-
tion.

Wherefore, plaintiff in error prays that the final decision of the
Supreme Court of Missouri in this cause be reversed by the Supreme
Court of the United States.

CYRUS CRANE &

LATHROP, MORROW, FOX & MOORE.

Attorneys for Plaintiff in Error.

166½ [Endorsed:] Supreme Court of Missouri. New York Life
Insurance Co., Plaintiff in Error, vs. Richard G. Head, Jr.
(by next friend), Defendant in Error. Petition for Writ of Error.
Assignments of Error. Copy.

167 UNITED STATES OF AMERICA, ss:

To Richard G. Head, Jr., by his next friend, Greeting:

You are hereby cited and admonished to appear at a Supreme
Court of the United States at Washington within thirty (30) days
from the date hereof, pursuant to a writ of error filed in the clerk's
office of the Supreme Court of the State of Missouri, wherein New
York Life Insurance Company is plaintiff in error, and you are de-
fendant in error, to show cause, if any there be, why the judgment
rendered against the said plaintiff in error, as in the said writ of
error mentioned, should not be corrected, and why speedy justice
should not be done to the parties in that behalf.

Witness, the Honorable Henry Lamm, Presiding Judge of the

Supreme Court of Missouri, En Banc, the 13th day of April, A. D. 1912.

HENRY LAMM,
*Presiding Judge of the Supreme
Court of Missouri, en Banc.*

Attest:

J. D. ALLEN,
Clerk Supreme Court.

Copy of the within citation received this 16th day of April, A. D. 1912.

BOTSFORD, DEATHERAGE & CREASON,
Attorneys for Defendant in Error.

Received this writ on the 16th day of April and on the 16th day of April, 1912, I served the same by delivering a true and certified copy with all the endorsements thereon to the within named Botsford, Deatherage and Creason, and have their signatures in proof thereof.

JOHN M. ROOD, *Sheriff,*
By HARRY N. DUCK, *Deputy.*

Fee \$1.00 paid by New York Life Ins. Co.

167½ [Endorsed:] New York Life Insurance Company, Plaintiff in Error, vs. Richard G. Head, Jr., by his next friend, Defendant in Error. Citation and Return. Copy.

168 In the Supreme Court of the State of Missouri.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
RICHARD G. HEAD, JR., by His Next Friend, Defendant in Error.

Bond.

Know all men by these presents, That we, New York Life Insurance Company as principal and C. G. Hutchison and A. C. Jobes as sureties, are held and firmly bound unto Richard G. Head, Jr., in the above entitled cause, in the sum of Sixteen Thousand Dollars (\$16,000), to be paid to the said Richard G. Head, Jr., to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 12th day of April, 1912.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Missouri,

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be ad-

169 judged if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

NEW YORK LIFE INSURANCE COMPANY,

By P. S. KYGAR, *Its Cashier*.

C. G. HUTCHISON,

A. C. JOBES.

Bond approved, and to operate as a supersedeas.

HENRY LAMM,

Presiding Judge of the Supreme Court, en Banc.

O. K.

BOTSFORD, DEATHERAGE AND CREASON.

169½ [Endorsed:] New York Life Insurance Company, Plaintiff in Error, vs. Richard G. Head, Jr., by his next friend, Defendant in Error. Bond. Copy.

170 UNITED STATES OF AMERICA, ss:

Supreme Court of Missouri.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Missouri in the City of Jefferson, this 2nd day of May, A. D. 1912.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,

Clerk of the Supreme Court of the

State of Missouri.

Endorsed on cover: File No. 23,206. Missouri Supreme Court. Term No. 255. New York Life Insurance Company, plaintiff in error, vs. Richard G. Head, Jr., by his next friend, B. F. Deatherage. Filed May 11th, 1912. File No. 23,206.

INDEX.

	Pages.
Statement	1 - 6
Specifications of Error	6 - 9
Brief of the Argument	10-26

POINT I. The original contract of insurance was entered into between non-residents of Missouri, who agreed that it should be controlled by the laws of New York. This was a valid provision and cannot be annulled by the courts of Missouri.....10-16

AUTHORITIES:

Smith vs. Mutual Benefit L. I. Co., 173 Mo., 329	10
Burridge vs. New York Life Ins. Co., 211 Mo., 158	10
Gibson vs. Connecticut Fire Ins. Co., 77 Fed. Rep., 561....	11
London Assurance vs. Companhia de Moagens, 167 U. S., 149	13
Kroegher vs. Calivada Colonization Co., 119 Fed. Rep., 641, at 652.....	13
Mutual Life Insurance Co. vs. Dingley, 100 Fed. Rep., 408	14

The following cases relied on by defendant in error dealt with contracts of *residents* or citizens of Missouri and are, therefore, distinguishable, to-wit:

Cravens vs. Insurance Co., 148 Mo., 583, 593, 604	14
Price vs. Insurance Company, 48 Mo. App., 281	14
Horton vs. Insurance Company, 151 Mo., 604, 612	15
Burridge vs. Insurance Co., 211 Mo., p. 162	15
Smith vs. Mutual Benefit L. I. Co., 173 Mo., 329	15
Whitfield vs. Insurance Co., 205 U. S., 489	15
Equitable Life Ins. Co. vs. Clements, 140 U. S., 226, 229	15
Life Insurance Co. vs. Russell, 77 Fed. Rep., 94	16

POINT II. The policy loan agreement was not a Missouri contract. It was signed and delivered outside the state of Missouri by parties who were non-residents of that state and cannot be controlled or governed by the Missouri non-forfeiture laws.....16-21

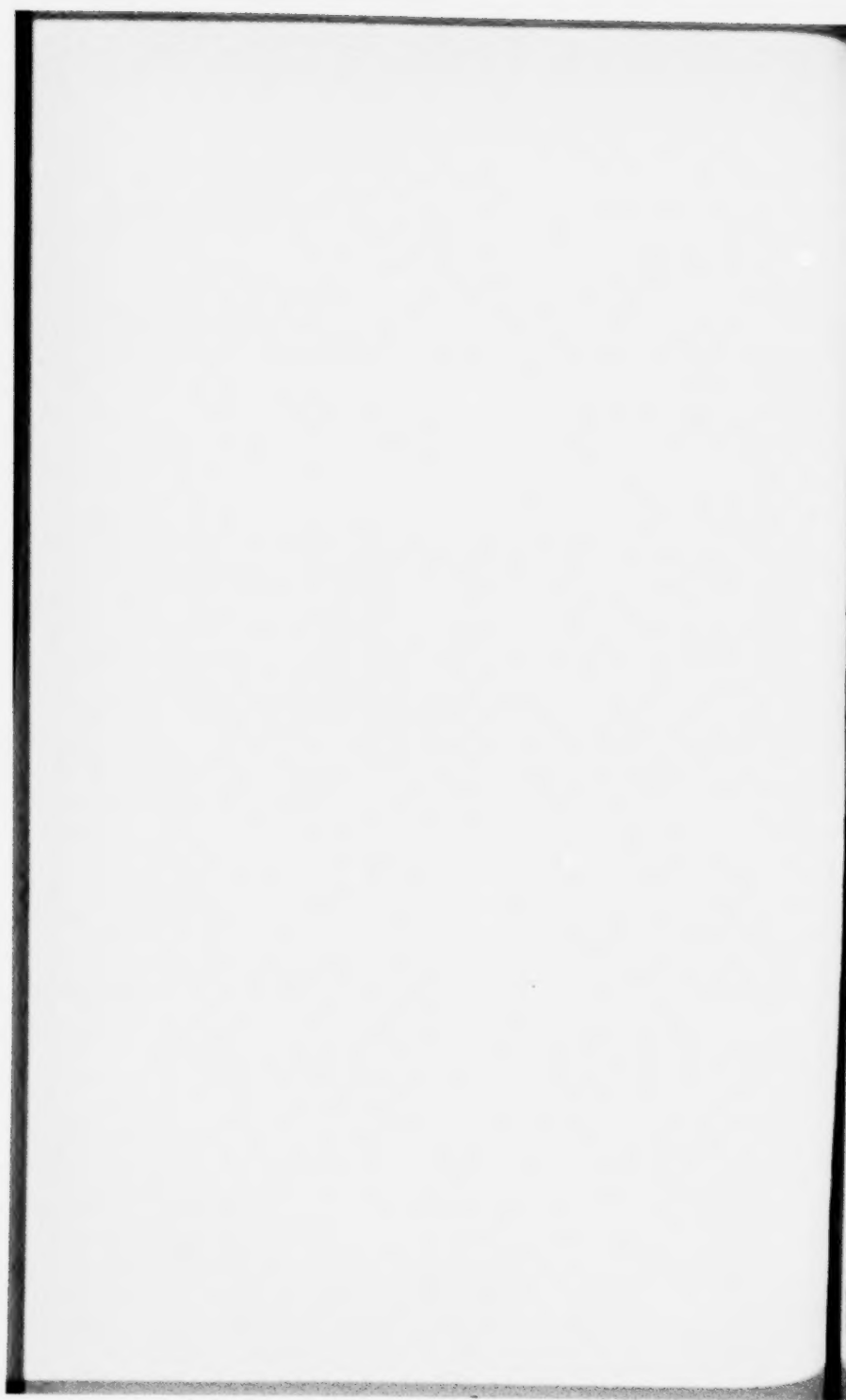
AUTHORITIES:

The original contract could be lawfully amended or changed by the loan agreement.	
Cooley's Briefs on the Law of Insurance, Vol. 1, p. 900	19
S. S. White Dental Mfg. Co. vs. Delaware Ins. Co., (D. C.,) 105 Fed., 642.	19
Leonard vs. Charter Oak Ins. Co., 65 Conn., 529, 33 Atl., 511	19
Fireman's Fund Ins. Co. vs. Dunn, 22 Ind. App., 333, 53 N. E., 251.....	19
Kattelman vs. Fire Assn., 79 Mo. App., 447	19

POINT III. The right of plaintiff in error to make contracts is protected by Section 1 of the Fourteenth Amendment and to attempt to deprive it of this right raises a constitutional question and gives this court jurisdiction.. 21-26

AUTHORITIES

Allgeyer vs. Louisiana, 165 U. S., 578, at 591....	21
Lochner vs. New York, 198 U. S., 45, at 52, 53	21
Door Co. vs. Fuelle, 215 Mo., 421, at 458	21
Pennoyer vs. Neff, 95 U. S., 714, at 722	21
Union Bank vs. Board of Commissioners, 90 Fed., 7, at 9	21
Olcutt vs. Supervisors, 16 Wall, 677, at 690	21
Havemeyer vs. Iowa County, 3 Wall, 294	21
Keller vs. Insurance Co., 58 Mo. App., 557, l. c. 560	22
Whitfield vs. Insurance Co., 205 U. S., 480.....	22
Greenhood on Public Policy, p. 2.....	22



—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

RICHARD G. HEAD, JR., BY HIS NEXT
FRIEND, B. F. DEATHERAGE,
Defendant in Error.

Number 255.

STATEMENT.

This is an action upon a policy, or contract, of insurance.

The question to be determined is whether the rights of the parties are measured by the terms and provisions of the written contracts which they executed or by the terms of the following statute of the State of Missouri in force at the time the original policy was issued:

"Sec. 5856. *Policies non-forfeitable, when.*—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to-wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to

the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premiums and the assumption of mortality and interest aforesaid; * * * (Revised Statutes Mo. 1889.)

We contend that inasmuch as none of the parties to the contract of insurance were citizens of the State of Missouri, either at the time the contract was made or thereafter, and performance was not contemplated there, they were at liberty to agree, as they did, that the contract of insurance should "be construed according to the law of the State of New York—the place of said contract being agreed to be the home office of said company in the city of New York" (Trans., Rec. p. 28), notwithstanding the application was taken in Missouri and the policy delivered in that state.

We contend, also, that a certain loan agreement, executed outside the State of Missouri, fixing the terms upon which the policy and its accumulations became security for a loan made by the Insurance Company to the beneficiary and the assured, measures and determines the rights of the parties to this action.

We contend that the decision of the Supreme Court of Missouri in this case, holding, in effect, that the Missouri statute above set out must be read into the contract between these citizens of other states because the original policy was delivered in Missouri and that they were thereafter without the power or right, even though outside the territorial limits of Missouri, to enter into a valid and binding loan agreement inconsistent with the provisions of the Missouri law, is a plain, direct, unequivocal invasion of rights guaranteed by the Constitution.

The constitutional questions were raised upon the trial by objections to evidence (Trans. Rec., p. 50); by objections to the declarations of law given by the Court at the request of the defendant in error here (Trans. Rec., pp. 98, 99); by requests for instructions which were denied (Trans. Rec., pp. 99, 100); and by the Company's motion for a new trial (Trans. Rec., pp. 101, 102).

The New York Life Insurance Company (which we will hereinafter call "the Company") is incorporated under the laws of the State of New York and has its head offices in that state. At the time the policy in controversy was written, the Company was authorized to do business in the State of Missouri and at that time and since that time it has maintained a branch office at Kansas City, Missouri.

Richard G. Head, the assured, was at the time he applied for the policy and up to the time of his death, a citizen of New Mexico, residing in that (then) territory.

In March, 1894, while Mr. Head was in Kansas City on business, he applied to the Company for insurance aggregating \$20,000.00, in two separate policies of \$10,000.00 each. One application covered both policies. In this application, the residence of Mr. Head was stated to be Watrous, New Mexico, but the application, itself, was dated at Kansas City, Missouri. Upon this application two policies were issued, reciting that the Company insured the life of Richard G. Head, of Watrous, New Mexico. The application, which was made a part of the policies, stipulated that the contracts of insurance should be construed according to the laws of New York—the place of said contract being agreed to be the home office of said company in the city of New York.

Mr. Head's application for the policies was taken in Missouri. On signing the application, he gave his note for the premium to the soliciting agent (Trans. Rec., p. 20) and instructed the agent to give the policies, when they were received, to his friend, Mr. Deatherage, of Kansas City, Missouri (Trans. Rec., p. 20). Accordingly the soliciting agent, to whom the policies were sent for delivery, handed them, on their arrival in Kansas City, to Mr. Deatherage and the latter handed them to Mr. Head when he was in Kansas City a short time afterward.

The policy by its terms was payable in the State of New York and it stipulated that the premiums, while payable there, might be paid to any agent producing a receipt therefor. The first premium was paid through the Kansas City branch, but thereafter, with one exception, the premiums were paid through the New Mexico or the Colorado branch of the Company. The policy as originally written is found in full on pp. 22-29 of the Transcript of the Record.

There is no contention that Richard G. Head, the assured, and his minor son, the defendant in error, were not residents of New Mexico from the time the policies were delivered until Mr. Head's death.

The original policies of insurance were numbered 599,690 and 599,691 and were both in favor of the assured's minor son, Richard G. Head, Jr., the defendant in error here, but in February, 1903, the beneficiary, through his duly appointed guardian, the assured, assigned one of the policies (No. 599,690) to his sister, Mary E. Head, (Trans. Rec., p. 78) who is the defendant in error in a companion case, No. 254, for hearing at this term of this court.

In 1904, the assured, as guardian of Richard G. Head, Jr., applied to the Probate Court of Mora County, New Mexico, for leave to borrow money on the policy in controversy. Pursuant to said application, the Probate Court granted the order prayed for, authorizing Mr. Head, as guardian of his son, "to borrow money" and providing that "to secure to said company the repayment of said loan the said guardian is hereby authorized and empowered to make and extend to said company such notes and written contracts as may be required therefor and upon terms and conditions, as required by said company." The record of these proceedings is found on pages 66-69 of the Transcript of the Record.

In pursuance of the order of the Probate Court so made, Richard G. Head, as guardian of Richard G. Head, Jr., borrowed \$2,270.00 from the Company. As collateral security for the repayment of the loan, the assured and his son pledged and deposited said policy and its accumulations with the Company. The pledge was evidenced by a written instrument in the customary form required by the Company and known as a policy loan agreement. It was executed by the assured as an individual and in his representative capacity as guardian. Among other things the loan agreement provided:

"1st. The interest on said loan shall be paid in advance
* * * at the rate of 5% per annum at the home office of
of said company in the city of New York;

2nd. If any premium on said policy, or any interest
on said loan is not paid on the date when due, settlement of
said loan and of any other indebtedness on said policy shall
be made by continuing said policy, without further notice, as

paid up insurance of reduced amount in accordance with Section 86, Chapter 690 of the laws of 1892 of the State of New York." (Trans. Rec., p. 31.)

This agreement was executed and forwarded by Richard G. Head from New Mexico, where, as we have already said, he resided with his family, to the Colorado branch office of the Company at Pueblo. The loan was made under this agreement.

The annual premium which fell due in 1905 was not paid, but the assured was permitted to pay the company \$107.00 in cash and to give a note, due October 3rd, 1905, for the remainder of the yearly premium. The note, so-called, is set out on page 37 of the Transcript of the Record and it will be seen, from an inspection, that if not paid when due, it automatically ceased to be a claim against the maker. This so-called note was not paid. Upon the failure to pay the April premium, the Company, under the terms of the loan agreement, settled the loan secured by said policy by continuing the policy as paid up insurance of reduced amount. The policy was so marked and Mr. Head was so advised.

The assured died April 8th, 1906.

The proof shows and the defendant in error concedes that the Company has performed, or tendered performance of all its obligations under the written terms of the contract of insurance, consisting of the policy and the loan agreement in conformity with the laws of the State of New York. The controversy is whether the written provisions of the policy and the loan agreement govern the rights of the parties as plaintiff in error contends, or whether, as defendant in error contends, the statutes of Missouri are to be considered as written into the policy and the rights of the parties determined by those statutes under the construction placed thereon by the Supreme Court of Missouri in the case of *Smith v. Mutual Benefit L. I. Co.*, 173 Mo., 329. We question and challenge the soundness of that decision, but the defendant in error claims that the rights of the parties are governed by the Missouri statute, as construed in the Smith case, *supra*, and that therefore, the policy was in force for the full amount at the time of the assured's death.

The action was brought and tried in the State Court in Missouri. The trial court sustained the contention of the defendant

in error here and entered judgment for the full amount of the original policy. This judgment was affirmed by the Supreme Court of Missouri (Trans. Rec., p. 109) *in banc* (two of the judges dissesing) and a writ of error was allowed to this Court.

SPECIFICATIONS OF ERROR.

1. Because the Supreme Court of the State of Missouri denied to the plaintiff in error a right, privilege and immunity to which it is entitled and which is guaranteed to it under and by Section 10 of Article I of the Constitution of the United States, and under and by Section 1 of Article XIV of the amendments thereof in that the Supreme Court of the State of Missouri by its ruling and decision in said cause held that the contract of insurance sued upon and which was the basis of the action, was governed as to the amount due thereunder by the laws of the State of Missouri as said laws existed at the time said contract of insurance was executed and not by the terms of the written contract of insurance, notwithstanding the fact that neither the plaintiff in error, who was defendant in said action, nor any of the other parties to said contract, nor any persons beneficially interested therein, were residents or citizens of the State of Missouri at the time said contract was entered into nor at any time thereafter, and also notwithstanding that the parties to said contract of insurance expressly agreed and wrote into said contract that the said contract should be governed and construed by and under the laws of the State of New York, of which state this plaintiff in error is and was a resident and citizen.

2. Because the Supreme Court of the State of Missouri erred in its holding and decision and in its opinion, and particularly in paragraph 4 thereof, that the loan agreement which formed part of the entire contract of insurance sued upon in this action and the terms of which constituted a defense to this said action, was void and inoperative so far as the same was in conflict with the laws and statutes of the State of Missouri as they existed at the time the original policy of insurance was issued, notwithstanding the fact that neither of the parties to said loan agreement (who are also parties to this said action) were residents or citizens

of the State of Missouri at the time said loan agreement was entered into, nor at any time prior thereto, nor at any time thereafter, and notwithstanding the fact that said loan agreement was made, executed and delivered outside of the jurisdiction and territorial limits of the State of Missouri, and by so ruling and holding, the Supreme Court of the State of Missouri denied the plaintiff in error a right, privilege and immunity to which it is entitled and which is guaranteed to it under and by Section 10 of Article I of the Constitution of the United States and under and by Section I of Article XIV of the amendments thereto.

3. Because the Supreme Court of the State of Missouri deprived the plaintiff in error of a right and immunity to which it was entitled under Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment of said Constitution; (A) by refusing to hold that the Circuit Court of Jackson County, Missouri, in the trial of this cause, committed error in giving the following instructions declared by the trial court to be the law in this case, over the objections of the plaintiff in error, made orally at the time, that to apply the Missouri statutes and laws to the insurance contract in question, "would violate and be in contravention of plaintiff in error's rights under Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment of said Constitution;"

(a) The court instructs the court sitting as a jury that on the uncontradicted facts of the case as they appear from the evidence, the policy of insurance in this action was and is a Missouri contract governable by the laws of Missouri in force at the time of the issuance of said policy, and not governable by the laws of the state of New York.

(b) The court instructs the court sitting as a jury that on the facts shown in evidence in this case the plaintiff is entitled to recover and that the issues on the pleadings herein should be found in favor of the plaintiff and against the defendant.

(c) The court instructs the court sitting as a jury that the policy sued on in this action was kept alive by the laws of Missouri to a time subsequent to the death of Richard G. Head, Sr., by the net value of said policy at the time of his default in 1905, and that the plaintiff is entitled to a finding and judgment herein

against defendant for the amount of said policy, to-wit, \$10,000, less the amount of \$2,270 with interest, and less the further sum of \$318 and \$425 due for premiums, with interest, and that after deducting from said \$10,000 the principal and interest of said three amounts, and computing interest on the balance at six per cent per annum from July 6, 1906, to the day of the finding and judgment herein, the finding and judgment should be for such balance with interest computed as aforesaid.

And (B) by erroneously holding that the said trial court did not commit error when it refused to sustain objections to the introduction of evidence, made orally by plaintiff in error at the time of the trial of this cause, based on the ground that to admit such evidence was in violation of the rights of plaintiff in error under the sections of the Constitution and amendments thereto above mentioned.

4. Because the Supreme Court of the State of Missouri deprived plaintiff in error of a right and immunity to which it was entitled under Section 10 of Article I of the Constitution of the United States and of the Fourteenth Amendment thereto in refusing to give the following instructions requested by the plaintiff in error.

(a) The court declares the law to be that under the undisputed evidence in this case, the plaintiff herein is not entitled to recover any sum in excess of the amount tendered by the defendant, the sum being the face of the paid-up policies tendered the plaintiff before this suit was instituted.

(b) The court declares the law to be that the terms of the loan agreement entered into between the parties hereto in 1904, and offered in evidence, controls and determines the amount the plaintiff should recover in this case.

5. Because the holding of the Supreme Court of the State of Missouri, as shown by that portion of its opinion hereafter in this paragraph set forth, impairs the obligation of a contract contrary to Article I, Section 10 of the Constitution of the United States and deprives plaintiff in error of its liberty of contract and property without due process of law in contravention of and in violation of the Fourteenth Amendment of said Constitution in that the Supreme Court of this state does thereby declare the policy

loan agreement to be subject to the laws and statutes of the State of Missouri notwithstanding said loan agreement was made, executed and delivered wholly without the jurisdiction and territorial limits of the State of Missouri and that by said holding and ruling of the Supreme Court of Missouri the plaintiff in error was and is denied the right to alter or modify an original policy of insurance by an agreement entered into outside the territorial limits of the State of Missouri, notwithstanding, also, neither this plaintiff in error nor any of the parties or beneficiaries to or of said original policy of insurance and said loan agreement were or ever have been residents or citizens of the State of Missouri:

"We have held that this policy by original legal intentment was a Missouri Contract and to be wholly governed, construed and controlled by the laws of this state, and that it is neither modified nor altered by the written agreement entered into at the time of the loan made in 1904. It necessarily follows that neither the tender nor payment (if it had been received) of the \$89.00 would preclude the beneficiary from enforcing her rights under this contract according to the laws of Missouri if \$89.00 was not all of the sum unquestionably due her at the time."

6. Because the Supreme Court of Missouri in its opinion and statement of the cause failed to note and pass on the constitutional rights urged by plaintiff in error and in such action plaintiff in error asserts and submits that its constitutional rights, privileges and immunities have been denied, to-wit: The obligation of the contract of insurance and policy loan agreement have been impaired contrary to Article I, Section 10 of the Constitution of the United States, and plaintiff in error has been deprived of its liberty of contract and property contrary to the Fourteenth Amendment of said Constitution.

BRIEF AND ARGUMENT.

I.

The original policy or contract of insurance was entered into between an insurance company organized under the laws of the State of New York with its home office in the State of New York on the one hand and a citizen of the territory of New Mexico on the other hand. Neither of the contracting parties (nor the beneficiary) being a resident of the State of Missouri, they had the right to agree between themselves that the contract of insurance should be governed by and construed according to the laws of the State of New York.

The decisions which hold that the statutes of Missouri must be read into a policy of insurance entered into between an insurance company and a resident of that state if the policy is delivered in that state, do not determine the merits of this controversy.

In all of the decisions relied upon by the defendant in error in support of the proposition that the amount to be paid under the policy of insurance is determined by the Missouri statutes of 1889, stress is placed not only upon the fact that the insurer entered into the contract in the State of Missouri, but also upon the further fact that the assured was a *citizen and resident* of the State of Missouri.

The cases of *Smith v. Mutual Benefit Life*, 173 Mo., 329, and *Burridge v. New York Life Insurance Co.*, 211 Mo., 158, are not controlling here. In those cases the contract of insurance was between an insurance company and a *resident* of the State of Missouri, consummated by a delivery of the policy within the State of Missouri and not thereafter modified by any valid agreement between the parties. There is a vital distinction between the case at bar and the Smith and Burridge cases, *supra*, in that in this case the contract of insurance was between parties, none of whom were citizens of the State of Missouri. In the opinions of the Supreme Court of Missouri in both the Smith and Burridge cases, *supra*, attention is specifically directed to the fact that the assured at the time they applied for and received their policies were citizens or residents of the State of Missouri. In all of the cases so far as we are aware, in which the doctrine of those cases has been applied, as well as in those cases on which the Court relied in ar-

riving at the conclusions announced in the Smith and Burrige cases, the assured were *citizens and residents of the state whose statutes were read into the contract of insurance*. The distinction rests on well-settled principles of law. The right of the State to step in and offer its citizens either real or fancied protection as a condition precedent to permitting a foreign company to write insurance within its jurisdiction, is not denied. But those cases do not hold, nor so far as we are aware has it ever been held in any case prior to these, that citizens of different states might not meet in a third state and agree that the contract entered into between them should be performed in and governed by the laws of the domicile of one of them and not by the laws of the state in which it happened that the contract was made. Especially must this be true where there is nothing inherently illegal or immoral in the subject-matter of such contract.

There is no apparent reason why under the guise of a law declaratory of its public policy, the legislature of one state should attempt or should be permitted to limit the right to contract between citizens of other states in regard to matters to be performed outside of that state.

In this case the parties to the contract of insurance being non-residents of Missouri, agreed that the laws of the state domicile of one of them (New York) should govern as to certain non-forfeiture provisions instead of the laws of the State of Missouri. It is clear that the denial of this right of contract cannot be justified upon any argument based upon the right of the state to protect its own citizens and residents.

An inspection of the policy or contract of insurance shows that no part of it was to be performed in Missouri.

In the case of *Gibson v. Connecticut Fire Insurance Co.*, 77 Fed. Rep., 561, an insurance agent doing business in St. Louis had been insuring the St. Louis property of the plaintiff and being aware of the fact that plaintiff owned a house and lot at Lake Minnetonka, Minn., solicited the insurance on that property and obtained an order to write it. The agent thereupon wrote to one Gilbert, an insurance agent at St. Paul, asking him to place \$5,000.00 of insurance upon the property in question in companies represented by him. Gilbert, who was the local agent for the defendant company at St. Paul, forwarded an application to the

company at Hartford for a risk of \$2,500.00 on this property. The risk was accepted and a policy forwarded to Gilbert to be countersigned by him, the policy providing it would not be valid until countersigned by the duly authorized agent of the company at St. Paul. On receipt of the policy, Gilbert sent it by mail to the agent at St. Louis, directing him to deliver the policy to plaintiff if acceptable. It was accepted by the plaintiff. It was contended under this state of facts that the policy was a Missouri contract, inasmuch as it did not become consummated until accepted by the plaintiff at St. Louis. The court say (the italics are ours):

"But the question remains, did this mere act of the acceptance of the plaintiff at St. Louis have the effect in law to make the policy a Missouri contract? I hold that when plaintiff accepted the policy he thereby ratified the acts of Gilbert, the Minnesota agent, and by relation it became operative as a Minnesota contract. The case is distinguishable in its facts from cases like those relied upon by plaintiff's counsel such as life policies where the *assured lived in Missouri* and the insurance was effected through a soliciting agent of the non-resident company where the *assured resided* when the policy was forwarded to the local agent to be countersigned and delivered by him to the assured to become operative on payment of the first premium. * * * It is a principle of universal justice that in every forum a contract is governed by the law with a view to which it was made and, therefore, the mere place should not govern the transaction when it appears that it is entered into with a direct reference to the law of another country. Second; that it is necessary to consider by what general law the parties intended that the transaction should be governed or, rather, by what general law it is just to presume that they have submitted themselves in the matter. Third: That it is to be remembered that in obligations it is the will of the contracting parties and not the law which fixes the place of fulfillment, whether that place be fixed by express words or by tacit implication as the place to the jurisdiction of which the contracting parties elected to submit themselves. There is neither anything in the Missouri statutes nor under the general law to prevent parties from making a contract solvable by the laws of Minnesota respecting property situated in that state."

Upon similar reasoning there should be nothing to prevent parties not citizens of Missouri from entering into a contract of

life insurance in that State without being compelled to accept the terms of the Missouri statute against their will as expressed by the contract itself.

Attention is again called to the fact that the application and the policy both stated that the assured was a resident of New Mexico. Therefore, the Insurance Company knew that it was not contracting or dealing with a citizen of Missouri who would be entitled to invoke the laws declaratory of the public policy of that state.

In the case of *London Assurance v. Companhia de Moagens*, 167 U. S., 149, the court was called upon to construe a contract of insurance made in Philadelphia by its agents which recited that the contract was to be performed in England. The court says:

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London and to be paid there. * * * Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. * * * In *Scudder v. Union National Bank*, 91 U. S., 406, the broad statement of the foregoing cases was somewhat narrowed, and it was stated that the law prevailing at the place of the performance of a contract regulated matters connected with its performance and that matters bearing upon the execution, interpretation and validity of the contract were determined by the law of the place where it was made. Even upon that limitation of the doctrine, we think, the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyd's. This is what the parties expressly stipulated for and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own."

To the same effect, see *Kroegher v. Colivada Colonization Co.*, 119 Fed. Rep., 641, at 652.

In this connection, we call attention to the fact that the law of the State of New York equally with the law of the State of Missouri provides for the non-forfeiture of the policy in question; but in 1894, when the policy was written, the non-forfeiture provisions under the New York statute were different from those which obtained in Missouri, although the policy of both states, as established by their legislation, was against the absolute right of the company to declare a forfeiture.

See also *Mutual Life Ins. Co. v. Dingley*, 100 Fed. Rep., 408.

Counsel for defendant in error contend that the fact that the assured was not a resident of Missouri is immaterial since the application was made in that state and the policy (as they claim) delivered there. But so far as we have been able to find, there is not a case in the books—certainly not in the cases heretofore cited by counsel for defendant in error—in which it appears that the assured was not a *resident* of the state, the laws of which were being invoked in behalf of the beneficiary as against the express terms of the insurance contract itself. In all of the Missouri cases upon which counsel rely so strongly, especial mention is made of the fact that the assured was a resident of the State of Missouri and more or less stress placed upon that circumstance. In support of this assertion we give the following brief excerpts from the statement of facts or opinions of the court in the various cases heretofore cited by counsel for the defendant in error.

(Italics in all cases are ours.)

In *Cravens v. Insurance Company*, 148 Mo., 583, in the statement of facts it is said, page 593:

“That on the 2nd day of May, 1887, (when the assured applied for his policy) and long prior thereto, John K. Cravens was a *citizen of the state of Missouri*;
and, again, in the same page:

“That on the 2nd day of May, 1887, the local agents of defendant solicited said John K. Cravens at *his residence in the County of Jackson, State of Missouri*, to insure his life, etc.”

and again, on page 604, the court says, (quoting from *Price v. Insurance Company*, 48 Mo. App., 281):

“Where an insurance company does business in this state and issues its policies of insurance *to residents of this state*,

the validity of clauses in its policies must be determined by the laws of this state."

In *Horton v. Insurance Company*, 151 Mo., p. 604, the syllabus states:

"Although the insured expressly agreed in his application that the contract of insurance should be governed by the New York statute, yet because it appears from the record that company's agent at the Missouri town *where the insured lived* and the application was taken, etc.;"

and in the statement of facts, it is said, page 612:

"Said T. Lyle Standish, the insured named in the policy, was, at the time of his application therefor, and continually until his death, *a resident of Hume, in Bates County, Missouri*, his application for the policy was there made, etc."

In *Burridge v. Insurance Company*, 211 Mo., p. 162, the statement of facts begins as follows:

"Defendant is a life insurance company incorporated in the state of New York at the times in question and John F. Reifsnnyder was a resident and citizen of Missouri and so was his wife, Frances A."

In *Smith v. Mutual Benefit L. I. Co.*, 173 Mo., 329, the statement of the facts begins as follows:

"This is a suit on a policy of life insurance issued by defendant, which is a New Jersey corporation, on the life of Samuel I. Smith, for the benefit of his wife, the plaintiff, for \$10,000.00. Smith and wife were *residents of this state*. The application was made to an agent of defendant in St. Louis and the policy issued there."

In *Whitfield v. Insurance Co.*, 205 U. S., 489, the statute relied upon by the beneficiary of the policy expressly provided that

"In all suits upon policies of insurance on life hereinafter issued by companies doing business in this state to a citizen of this state, it shall be no defense that the insured committed suicide, etc."

It is clear, therefore, that in the Whitfield case the respondent was a resident of Missouri.

In *Equitable Life Ins. Co. v. Clements*, 140 U. S., p. 226, the court calls attention to the fact (l. c. 229):

The answer admitted that said Wall was a *resident of the state of Missouri*, etc.

In *Life Insurance Co. v. Russell*, 77 Fed. Rep., 94, where the policy was written in Nebraska, the statement of facts shows clearly that Russell lived and died in Holt county, Nebraska.

We do not mean to be understood as contending that a state through its legislation may not prohibit citizens of other states from making contracts within its territory which are or may be harmful or prejudicial to its citizens or which are to be performed within its territory. We *do* contend that no state of the Union has the right to say to the citizens of other states that any contract made between them while temporarily within its territory and irrespective of the place of the performance of such contract, shall contain certain specific provisions and stipulations or that they cannot agree while within its boundaries that the laws of the state within which one or the other or both of them are residents shall govern an agreement between them so long as it is not to be performed within the state where the contract is made.

One state has no right to prescribe public policy for another when its own citizens or territory are in no way concerned.

II.

The settlement of the policy after the default in 1905 was made in strict accordance with the provisions of the policy loan agreement; the policy loan agreement was not a Missouri contract; it was signed and delivered outside of the state of Missouri by parties who were non-residents of that state.

In our statement of the case, we have detailed the facts with reference to a certain loan agreement which was made by assured in his individual capacity and also by him as guardian for his son, the beneficiary in the policy and the defendant in error here.

In order to place this feature of the case, which we deem decisive, clearly before this court, some repetition here may be excusable.

It will not be denied that at the time this loan agreement was made the defendant in error was a minor, residing in the Territory of New Mexico; that the assured, Richard G. Head, was also a resident of said territory; that the Company was a citizen and resident of the State of New York, but properly authorized to do business in the state of Missouri; that the loan agreement,

itself, was entered into outside of the State of Missouri; that authority to make the loan and enter into this loan agreement was obtained from the Probate Court of the County of Mora, Territory of New Mexico; that the Probate Court of that county, upon the application of the assured, who had theretofore been appointed the guardian of the defendant in error, authorized the execution of the loan agreement in behalf of the defendant in error, the essential provision of this order being as follows:

"The said guardian is hereby authorized and empowered to make, execute and deliver to said company such notes or loan contracts as may be required by said life insurance company therefor and upon the terms and conditions as required by said company."

(Trans. Rec., bottom page 68, top page 69).

In pursuance of this order, the Company required the agreement to be made which was actually entered into. The following are the specific provisions of the loan agreement which really fix and control the rights of the parties in this action:

"Interest on said loan shall be paid in advance from this day to the 3rd day of April, 1905, the date of the next anniversary of said policy, and annually in advance on and after said date at the rate of 5 per cent per annum, at the home office of said company in the city of New York.

"If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan or of any other indebtedness on said policy shall be made by continuing said policy without further notice as paid up insurance of reduced amount in accordance with Section 86, Chapter 690 of the laws of 1892 of the State of New York." (Trans. Rec., p. 81.)

We respectfully submit that although here was authority obtained from the Probate Court limiting the guardian to entering into only such a contract as the insurance company should require (and it is conceded that the Company required the contract which it actually entered into) and, therefore, the guardian could make no other, yet the Supreme Court of Missouri has given no weight or consideration to this vital or important fact, but, on the contrary, has said, in effect, and in defiance of the constitutional guaranties, that, although the making of the contract was limited by the order of a court of competent jurisdiction and the parties made

the contract as directed by that court, yet the courts of Missouri can and will make for them another and different contract, even though none of the contracting parties are citizens and residents of Missouri and even though at the time they were not contracting within the territorial limits of Missouri, or attempting to enter into an agreement to be performed within the State of Missouri.

Is it possible that the Supreme Court of the State of Missouri can, as it has held it can do in this case, say to two non-residents, actually residing in other states, that they are not at liberty to make any contract they see fit which violates no law either of the state or territory where the contract is entered into or where it is to be performed?

Is it possible that the Supreme Court of Missouri can, as it has held that it can in this case, say to the plaintiff in error that in the making of contracts outside of the State of Missouri with citizens of other states, it is still bound by the Missouri law simply because it is legally qualified to do business within the State of Missouri?

Is it possible that after a Probate Court in the Territory of New Mexico has said to a guardian, appointed within its jurisdiction, "You are authorized to make a certain contract with the New York Life Insurance Company" and the Company, acting on the authority given by that order, makes a contract perfectly legal and valid both by the laws of the state where it is entered into and where it is to be performed and parts with its money on the strength of said contract, that the Supreme Court of Missouri can, as it has held it can do in this case, make for the parties another and entirely different contract and deny the validity of the contract entered into outside of the State of Missouri under the sanction of a court having jurisdiction and between parties who are citizens and residents of other states?

We feel confident that this court will not give its sanction to such holdings by the Supreme Court of Missouri because it is utterly subversive of the constitutional guaranties is respect to the liberty and freedom of making lawful contracts and destroys a right—a property right—that is, to make and enjoy the fruits of lawful contracts.

Conceding for the sake of the argument (which we do not, in fact) that the original policy, or contract of insurance, was a Mis-

souri contract and had, by operation of law, the statutes of Missouri written into it, still the subsequent loan agreement operated as a modification, or amendment of the original contract and provided that the contract should be governed by the laws of the State of New York as heretofore pointed out. This subsequent modification or amendment was entered into by non-residents of Missouri, contracting outside the territorial limits of that state. On well settled principles of law, their right to so amend the original contract by a new and independent agreement, without interference from the State of Missouri is beyond question.

Cooley's Briefs on the Law of Insurance, Vol. 1, p. 900. In support of the text, the well known author cites the following:

S. S. White Dental Mfg. Co. v. Delaware Ins. Co., (D. C.) 105 Fed., 642;

Leonard v. Charter Oak Ins. Co., 65 Conn., 529, 33 Atl., 511;

Firemen's Fund Ins. Co. v. Dunn, 22 Ind. App., 333, 53 N. E., 251;

Kattelman v. Fire Assn., 79 Mo. App., 447.

It is no answer to our contention on this point to say, as the Supreme Court of Missouri has said in its opinion, that, "It is not an open question in this state that all subsidiary contracts made by the parties to all insurance contracts are within the contemplation and purview of the original contract and are not to be treated as independent agreements."

The cases of *Burridge v. Insurance Co.*, 211 Mo., 158, and *Smith v. Insurance Co.*, 173 Mo., 329, which are cited by the Supreme Court of Missouri in support of this declaration, are not in point for the reason that in both of these cases the so-called "subsidiary" contracts (i. e. the loan agreements) were made by residents of Missouri within the territorial limits of Missouri and, therefore, the statutes of Missouri might be held to operate upon them just as upon the original contract of insurance.

Nor, we submit, is it fair to call the loan agreements "subsidiary" contracts. Let us assume for the purposes of the argument that both the Company and the assured were aware that at the time the application for a loan was made, the assured was contending and the insurance company was denying that the Missouri statute was a part of the original policy in question; can it be held,

after they finally agreed, the security for the repayment of the loan should be as fixed in the loan agreement, that such an agreement would be inoperative between them and that it was not within their power to amend or alter the original agreement, though contracting or dealing outside the boundaries of Missouri.

Clearly, such a holding would mean nothing less than that the original agreement was incapable of alteration; that not even the parties themselves could alter it, no matter where they might be or whether the terms were more favorable or less favorable to the assured than the original agreement. In other words, to uphold this decision of the Supreme Court of Missouri, this court must hold that the state court has the right to say to a non-resident, who happens to enter into a contract of insurance within Missouri, that thereafter, no matter where he may be and regardless of his necessities or interests, he cannot alter or amend his original contract of insurance in respect to the statutory provisions of Missouri, which were in force at the time his policy took effect.

It will not do to say that the insurance company was bound to make the loan regardless of any provisions for its repayment. It is true that the policy contained a promise upon the part of the Company to make loans upon the policy in question but there is no provision covering all the terms upon which such a loan would be made and the Company had the right to exact terms which would make the loan reasonably secure. The undisputed fact is that the insurance company exacted and the assured and beneficiary agreed to a specific and definite understanding, evidenced by the loan agreement itself, that, as security for the loan and in order that there might be no question about the adequacy of the security or how the amount of the security should be determined, the value of the policy should be measured and governed by the laws of the State of New York. Not even if the original policy of insurance was to be construed under the laws of the State of New York could the new agreement be properly called "subsidiary," but if it was not so construed, then the loan agreement was certainly not a subsidiary agreement and to call it such is to assume the whole case against the plaintiff in error and to deprive it of the property right which it has in its liberty of contracting.

The vital provision of the loan agreement is that clause which provides what shall be done in case the loan, or any interest, is not

paid when due. In case of default in respect to the loan or the hazard of the security through failure to pay the premiums, the original policy of insurance contained no stipulation or provision of any kind to govern the parties. How, then, can this court say that the parties were not free to make any contract they saw fit, not prohibited by the laws of the state where such contract was made or was to be performed, governing the question as to what kind of settlement should be made in case of such default?

From the foregoing, it will be seen that the decision of the Supreme Court of Missouri has struck down and invalidated an independent contract made by parties who were acting outside of its territorial limits, in no way subject or amenable to its laws, and has, therefore, interfered with and destroyed their property rights by denying them the freedom and liberty of making lawful contracts. It has done this by attempting to assert extra-territorial vigor for its own laws declaratory of its public policy and all of this is justified by terming the loan agreement "subsidiary."

III.

That the right of plaintiff in error to make contracts (the making of contracts being its principal business) is protected by Section 1 of the Fourteenth Amendment, is clear, and the attempt to deprive it of this right raises a constitutional question and gives this court jurisdiction.

Allgeyer v. Louisiana, 165 U. S., 578, at 591;

Lochner v. New York, 198 U. S., 45, at 52, 53;

Door Co. v. Fuelle, 215 Mo., 421, at 458;

Pennoyer v. Neff, 95 U. S., 714, at 722;

Union Bank v. Board of Commissioners, 90 Fed., 7, at 9;

Olcutt v. Supervisors, 16 Wall., 677, at 690;

Havemeyer v. Iowa County, 3 Wall., 294.

Plaintiff in error, though authorized to do business in Missouri, is in no sense such a slave of that state that it may not do business in other states without Missouri's permission. When, therefore, it enters into a legal and binding contract in another state with a non-resident of Missouri, albeit, relating to the subject-matter involved in a prior Missouri contract, or even changing the

terms of a Missouri contract, its authority for so doing and its right so to do cannot be denied without an invasion of its property rights guaranteed by the Constitution.

Let us see at this point exactly what the decision of the Missouri Supreme Court means. In the last analysis it means that the court is writing into the original contract of insurance and the subsequent loan agreement contract between the parties, who are non-residents of Missouri, the statutes or laws of Missouri declaratory of its public policy. The Missouri non-forfeiture statutes applicable to life insurance have been held to be exactly that—"legislative declarations of the public policy of the state."

Keller v. Insurance Co., 58 Mo. App., 557, l. c. 560;

Whitfield v. Insurance Co., 205 U. S., 480.

We do not question the right of the state to impress upon the contracts of *its own citizens* such terms as are consistent with the legislative declarations of its public policy, or to exact of corporations, as a condition precedent to the right to do business within the state, the observance of such public policy, but we deny that the state can, without infringement on the constitutional guaranties, impress or impose such legislative declarations of its public policy on the contracts of *non-residents*, which are to be performed in some other state and in no way affect either property or citizens of the state.

The underlying reason why the state has the right to impose its public policy upon the contracts of its citizens, even against the express terms therein contained, is because the contract of insurance affects citizens or subjects of the state and, therefore, the state has the right to demand for them the protection of its laws even against the wishes of the original contracting parties; but we deny the right of the state to *impose* its policies on the contracts of non-residents when such contracts are not to be performed within the state and affect none of its citizens, in the face of an expressed agreement that the contract shall be governed by the laws of another state.

The public policy of a state can only operate either on the citizens or subjects of the state or on transactions to be performed or done within its limits.

Greenhood on Public Policy, p. 2.

In this connection, it is pertinent to observe that in 1903 the Legislature of Missouri had actually amended the law in force at the time the original contract was written, so that when the loan agreement was made in 1904, its provisions were not inimical to the written terms of the original policy, nor to the provisions of the loan agreement. It follows that not only does this decision of the Supreme Court of Missouri destroy the contract contained in the loan agreement made outside the territorial limits of Missouri between non-residents, but it does so despite the fact that the loan agreement, itself, was not at the time when it was made, contrary to the public policy of the State of Missouri.

The present case falls squarely within the rule and reason of *Allgeyer v. Louisiana*, 165 U. S., 578.

The statute under consideration in the case was one imposing a fine upon any person, firm or corporation who should fill up, sign or issue in that state any certificate of insurance under and upon marine policies, or who in any manner whatever should do any act in that state to effect for himself or for another, insurance on property then in said state. The defendants were exporters of cotton from the port of New Orleans to ports in Great Britain and on the European Continent, who sold goods in New Orleans to purchasers at said ports.

Defendants mailed from New Orleans to an insurance company in New York a communication stating that insurance was wanted by them for open policies, loss, if any, to be payable in French currency in the City of Paris.

Concerning the power of the Legislature of the State of Louisiana to enact the statute in question insofar as the same related to the act of defendants in applying at New Orleans for the issuance of said policy in the State of New York, the Supreme Court, by Mr. Justice Peckham, says, *inter alia*:

"Has not a citizen of a state, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case (*supra*) and would be controlled by it. When

we speak of the liberties of contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstance of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State Legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such rights, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state, may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is a subject of the insurance may at the time when such insurance attaches, be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. *Milliken v. Pratt*, 125 Mass., 374; *Tilden v. Blair*, 21 Wall., 241.

The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the

rights or duties to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the state has no right or jurisdiction to prevent its citizens from making outside the limits of the state."

In the case of *Pennoyer v. Neff*, 95 U. S., 714, l. c. 722, Mr. Justice Field, speaking for the Supreme Court, says (the italics are ours) :

"The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them, being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil *status* and capacities of *its inhabitants*; to prescribe the subjects upon which they may contract, etc. * * * The other principle of public law referred to follows from the one mentioned; *that is, that no state can exercise direct jurisdiction and authority over persons and property without its territory.* * * * But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken: *whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation.*"

In the case of *Union Bank v. Board of Commissioners*, 90 Fed., 9, the court says (p. 9):

"The national constitution forbids the states to pass laws impairing the obligation of contracts, and that end can be accomplished no more by judicial decision than by legislation."

In *Ollcutt v. Supervisors*, 16 Wall., 677, the court said, p. 690 (the italics are ours):

"The court has always ruled that if a contract when made was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract and they do contract in view of the law as declared to them when their engagements are formed. *Nothing can justify us in holding them to any other rule.*"

So in this case, the parties, non-residents of Missouri, entered into a contract concerning a matter as to which they had the right to contract. That contract was valid under the laws of the state where made and where it was to be performed. How can this or any other court hold them to any other rule than to test the validity of the contract by the laws existing in those places at the time?

No question is raised here as to the validity of these contracts in the state where they were made but it is claimed that the courts of Missouri can lay their hands on such contracts and determine their validity according to its laws. We say this cannot be done under any law or decision which has been furnished to this court.

See *Havemeyer v. Iowa County*, 3 Wall., 294.

It is respectfully submitted that the judgment of the Supreme Court of Missouri should be reversed.

GARDINER LATHROP,

CYRUS CRANE,

O. W. PRATT,

Solicitors for Plaintiff in Error.

JAS. H. MCINTOSH,

Of Counsel.



—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

RICHARD G. HEAD, JR., BY HIS NEXT
FRIEND, *Defendant in Error.*

Number 255.

Statement and Brief of Plaintiff in Error in Opposition to Motion to Dismiss.

GARDINER LATHROP,
S. W. MOORE,
O. W. PRATT,
CYRUS CRANE,

Attorneys for Plaintiff in Error.

JAS. H. McINTOSH,
Of Counsel.



—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

RICHARD G. HEAD, JR., BY HIS NEXT
FRIEND, *Defendant in Error.*

} **Number 255.**

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

This motion to dismiss is presented only a short time before the case will be reached for hearing on the merits. Although it might have been presented long ago, it has been delayed until the present time, after plaintiff in error has made the necessary deposit to secure the printing of the record and before such printed record is available for the use of either counsel or the court. This case will be reached for hearing on the merits probably in March or April of the present year. Furthermore, the motion does not go to jurisdictional questions alone, but is an attempt to reach the whole case on its merits and to secure a decision without a full consideration thereof. In view of these facts and the further fact that the question raised in the motion to dismiss cannot properly be determined without a full consideration of the case and without going into those features of it which necessarily deal with the merits, it is respectfully submitted that this motion should be considered with the whole case on final hearing.

STATEMENT.

The policy, or contract of insurance, was entered into in 1894, between Richard Head, a citizen and resident of the then territory of New Mexico, and the plaintiff in error, New York Life Insurance Company, a citizen and resident of the State of New York, licensed to do business in the State of Missouri. The assured was in the live stock business and frequently came to Kansas City, Missouri, in connection with his business. In this way it happened that the application for insurance was made in Missouri. The record will show that practically all of the premiums on the policy were paid to and all transactions in regard to the policy were had with either the Insurance Company's office in New Mexico or in Colorado from the year 1895 until the policy was settled under the policy loan agreement. Where the first premium was paid is a disputed question of fact, but at that time, Mr. Head, the assured, being about to leave Kansas City, requested the soliciting agent to deliver the policy, when received, to his (Head's) friend, Mr. Deatherage, as a matter of convenience merely. Mr. Deatherage resided and had an office in Missouri. When Mr. Head came to Kansas City some time afterward, Mr. Deatherage delivered the policy to him at his office.

The application for this policy, which is made part of the contract of insurance, provides, among other things,

"That the contract containing such policy and this application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the State of New York."

The policy also contains certain non-forfeiture provisions which may be briefly stated to conform to the non-forfeiture provisions of the statutes of the State of New York relating to such matters.

In his application, which is made part of the policy, Mr. Head recited that he was a resident of the State of New Mexico, County of Mora, town of Watrous and that his place of business was there. The policy issued in pursuance of this application recites the same fact as to residence. The application likewise recites

that the proceeds of the policy, in event of death, are to be paid to Richard G. Head, Jr., whose residence, also, was Watrous, New Mexico. The proceeds of the policy, by its terms, are payable at the office of the New York Life Insurance Company in the State of New York.

In short, the contracting parties were both non-residents of the State of Missouri; the beneficiary was likewise a non-resident of said state; the place of performance, or payment, was outside of Missouri. The transaction happened in Missouri merely by chance, or as a matter of convenience to the assured.

The policy had been running but a few years when the assured and beneficiary borrowed money from the Insurance Company under the company's usual loan agreement. This loan was renewed and increased from time to time. On each occasion a new loan agreement was signed. The last loan agreement bears date in April, 1904. These loan agreements were all signed and delivered to the company's agent within the then territory of New Mexico *and it will not be claimed by defendant in error that they were either signed or delivered within the territorial limits of the State of Missouri or that there was in them any provision or agreement that they should be governed or controlled by the laws of said state.* The loan agreement of 1904 provided:

"Sec. 2. If any premiums on said policy, or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid up insurance of reduced amount in accordance with Section 88, Chapter 690 of the laws of 1892 of the State of New York."

And, also.

"Sec. 4. In the settlement of any claim or of any benefit under said policy, before said loan shall have been fully repaid, or before settlement shall have been made in accordance with Section 2 of this agreement, said company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy."

Neither the loan interest, nor the premium due in 1905, was paid and in May, 1905, the insurance company, in accordance with the terms of the loan agreement and on account of default in the payment of the premium and loan interest, due April 3, 1905, settled the policy in strict accordance with the terms of the loan agreement and in accordance with the terms of the face of the policy itself, and in accordance with the laws of the State of New York applicable thereto. The policy so endorsed for paid up insurance (\$89.00) was sent to Mr. Head and by him delivered to his daughter, who retained it until his death about a year later.

This suit was begun in September, 1906. The petition was in two counts. In the first count, plaintiff sought to recover under Sections 7897 and 7898 of the Revised Statutes of Missouri, 1899, and in the second count recovery was sought under Section 7899 of said statutes. Without setting forth the substance of the Missouri non-forfeiture statutes relied upon by defendants in error, suffice it to say that it is conceded that unless these statutes are to be read into the contract of insurance and unless the non-forfeiture provisions of the policy of insurance, and the terms of the policy loan agreement are entirely disregarded, there can be no recovery in this action.

It will be found from an inspection of the record, when printed, that at the proper time and in proper form, plaintiff in error throughout the trial in the *nisi prius* court and in the Supreme Court of Missouri, duly raised and saved all of the constitutional questions which are relied upon to give this court jurisdiction. Some of these are found in the statement of defendant in error and others will appear properly in the record itself. It is not and will not be claimed that there was any failure on the part of plaintiff in error to timely and properly preserve in the record and by assignments of error in this court any of these constitutional questions.

Many Missouri cases are referred to in the statement of defendant in error, but prior to the decision in this case, it had never been held in the State of Missouri that the insurance laws of the state were applicable to the insurance contracts of non-residents where neither the assured nor the beneficiary was a resident of such state and where the contract was to be performed entirely outside

of the state. In the Missouri cases referred to by defendant in error, the assured was in each instance a resident of the State of Missouri.

Subsequent portions of these suggestions will show clearly that the plaintiff in error does not concede that the brief of defendant in error correctly sets forth its contentions or the Federal questions which it invokes in order to give this court jurisdiction.

Counsel of defendant in error in their statement in support of this motion say: (page 4)

"It is not denied, but is admitted that the judgments in these cases were in conformity with the laws of Missouri relating to life insurance companies in force at and before the time of the issuance of these policies and at and before the time when this insurance company on its own application was licensed to do business as a foreign insurance company in the State of Missouri at Kansas City therein."

If, by this statement, counsel for defendant in error mean that we admit the Supreme Court of this state has held against us in this case, of course that is conceded; but until this case and its companion case had been decided, it had never been held in Missouri or elsewhere, so far as we are aware, that the non-forfeiture statutes of this state were, under such circumstances as exist here, to be read into the contract of insurance and that all provisions inconsistent therewith were to be eliminated; and that the parties thereafter, though non-residents of the state and contracting outside of its territorial limits, would not be permitted to amend or eliminate the statutory provisions thus read into the original contract.

BRIEF AND ARGUMENT.

I.

The Missouri non-forfeiture statutes applicable to life insurance contracts, just as its suicide statutes, are in effect merely "legislative declarations of the public policy of this state."

Keller v. Insurance Company, 58 Mo. App. 557, l. c. 560;
Whitfield v. Life Insurance Company, 205 U. S. 489.

II.

We do not deny or question the right of the state to impress upon the contracts of its own citizens such terms as are consistent with its legislative declarations of its public policy, or to exact of corporations, as a condition precedent to the right to do business within a state, that in such business as shall be done with the citizens of the state, the policy of the state shall be observed. It follows that if the contract of insurance in question had been entered into by a citizen of Missouri, the non-forfeiture statutes of Missouri would be read into the contract even though the contract, itself, stated that it was to be governed by the laws of the State of New York. This was the situation and the rule announced in all the Missouri cases referred to by defendant in error.

But such is not the situation presented in this case.

III.

Here, the Supreme Court of Missouri has read into the contract of non-residents the forfeiture laws of said state; (although, as pointed out heretofore, the beneficiary in the policy was likewise a non-resident; the contract of insurance was not to be performed within the state; affected in no way any resident or property within the state); against the expressed desire and contract of the non-resident parties, who stipulated in the contract that it should be governed by the laws of the State of New York. Plaintiff in error claims that this is a violation of the sections of the Constitution referred to in its assignments of error; that it is

an unwarranted and unconstitutional interference with the liberty of contract and the property right of contracting as well; that it is usurpation under authority of the state, in that an attempt is made to impose upon non-residents matters of the state's public policy to which obedience can be lawfully required only when one of the parties, at least, is a citizen of that state.

Pennoyer v. Neff, 95 U. S. 714, l. c. 722, where it is said:

"As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, etc.
* * * Whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation."

IV.

That the right of plaintiff in error to make contracts (the making of contracts being its only business) is protected by the Fourteenth Amendment admits of no controversy..

Allgeyer v. Louisiana, 165 U. S., 578, at 591;

Lochner v. New York, 198 U. S., 45, at 52, 53;

Door Co. v. Fuelle, 215 Mo., 421, at 458.

Here the contracting parties were two non-residents of Missouri, making a contract to be performed outside of the state and stipulating that it was to be governed by the laws of another state. This may properly be done and such a contract cannot be lawfully destroyed or impaired.

V.

The valid contract of these non-resident parties could not be lawfully impaired either by legislation or judicial decision.

Olcott v. Supervisors, 16 Wall. 678, where it is said:

No subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity.

Union Bank v. Board of Commissioners, 90 Fed. 7, where the court say, (page 9):

The national Constitution forbids the states to pass laws impairing the obligation of contract and that end can be accomplished *no more by judicial decision than by legislation.*

VI.

When the printed record is before this court, it will be found that a loan agreement was entered into by these same parties within the territorial limits of the then Territory of New Mexico; that the parties to this loan agreement were all non-residents of the State of Missouri and comprised all of the parties to the policy, or contract of insurance, including the defendant in error; that the *said loan agreement was prepared, executed and delivered outside of the State of Missouri and that it directly and in precise terms recognized and reaffirmed the non-forfeiture provisions contained in the original policy as delivered.* The decision of the Supreme Court of Missouri not only impairs the original contract by impressing upon it the provisions of the Missouri statutes, but it also, by impressing the same provisions upon this later contract nullifies and destroys it in violation of the constitutional guaranties. It deprives the plaintiff in error of its property without due process of law.

Emphasis is added to this contention when it is observed that in 1903 the Legislature of Missouri had actually amended the law in force at the time the original contract was written so that when the loan agreement was made in 1904, its provisions were not inimical to the written terms of the original policy nor to the provisions of the loan agreement. It follows, that not only does this decision of the Supreme Court of Missouri impair the contract contained in the loan agreement, made outside the territorial limits of Missouri between non-residents, but it does so despite the fact that the agreement, itself, was not at the time when it was made, contrary to the public policy of the State of Missouri.

VII.

We contend that counsel for defendant in error appear repeatedly to misapprehend the real questions at issue in the case, on which reliance is placed to give this court jurisdiction and notably so in Point 2 of their brief and argument. Defendant in error attempts to so put the question as to make it appear that the Insurance Company is claiming that these non-residents were not entitled to the benefit of the Missouri laws relating to life insurance *even if they had desired their protection and benefit when entering into the contract*. This is not a fair statement of the Insurance Company's position in this regard. We can admit that if these non-residents had entered into a contract with the Insurance Company which provided that the contract should be construed according to the laws of the State of Missouri, or if the contract, being made in Missouri, had omitted a stipulation to the effect that it should be governed by any other law, then they would be entitled to whatever advantage came to them by the non-forfeiture laws of the State of Missouri. But such a case is not before the court. Here the non-resident assured contracted that the policy should be governed by the laws of the State of New York and the non-resident beneficiary (both at the time the contract was made and at the time the suit was brought) is now demanding that the laws of Missouri be read into the original contract contrary to its expressed provisions, and into the subsequent loan agreement above referred to. The Courts of Missouri have complied with this demand of the defendant in error but the Insurance Company, by reason of the facts stated, denies the right of the courts of Missouri to do this and claims that to do so under the circumstances is a plain violation of the constitutional guaranties. This action of the courts exercised under State authority is nothing else than the taking of property and property rights without due process of law; the unlawful impairment of a valid contract; the deprivation of the liberty to contract and the denial of the right to equal protection of the law. Hence the authorities cited by defendant in error to the effect that a non-resident may have the protection of certain state laws under appropriate circumstances, or where he has expressly contracted therefor or with reference thereto, are beside the case and will be of no assistance to the court in the determination of the real questions.

VIII.

It will be seen, from what we have stated, that the decision of the Supreme Court of the State of Missouri in this case impairs the contract of insurance in *two* ways. Not only does it strike down certain provisions both of the original policy and the loan agreement, but it reads into the contract terms and provisions *without the consent and against the will of all the parties thereto.*

In other words, the court, exercising authority under the state, undertakes to make a new contract for the parties against the desire and will of both, as indicated by the original agreement.

Conceding the general rule that a contract can only be impaired within the meaning of that clause of the Constitution so as to give this court jurisdiction on a writ of error to the State Court, by some statute of the state subsequent to the contract, yet here the impairment is not, simply in the nature of the destruction of the agreement between the parties, but it takes the further form of creating a contract between the parties without their consent and against their will. The courts of Missouri by the decision in this case undertake to extend the statute law so as to reach and operate upon citizens of other states, casually within its confines, and not only deny them the right to make contracts of insurance to be performed elsewhere, except upon the terms of the Missouri statutes, but as to certain provisions actually write the contracts for these non-residents. The impairment of the contract of which we complain is wholly different from that sort of impairment which is involved in the cases cited by the defendant in error. Such action by the courts of Missouri is not properly a question of statutory construction at all. *It is interference by judicial decision with the liberty of contract. It is the taking of property, as in this instance, without due process of law.* And when, as here, the judicial decision of the court, acting under authority of the state, goes still further and denies to these non-resident parties the right to amend or alter or re-affirm the original contract of insurance by an agreement executed and delivered outside of the state and impresses such extra-territorial agreement with other terms and conditions to which neither party consented, creating and enforcing

liabilities where there were none by the terms of the contract, the denial of liberty and the taking of property without due process of law under the guise of judicial decision could scarcely be clearer.

Respectfully submitted,

GARDINER LATHROP,

S. W. MOORE,

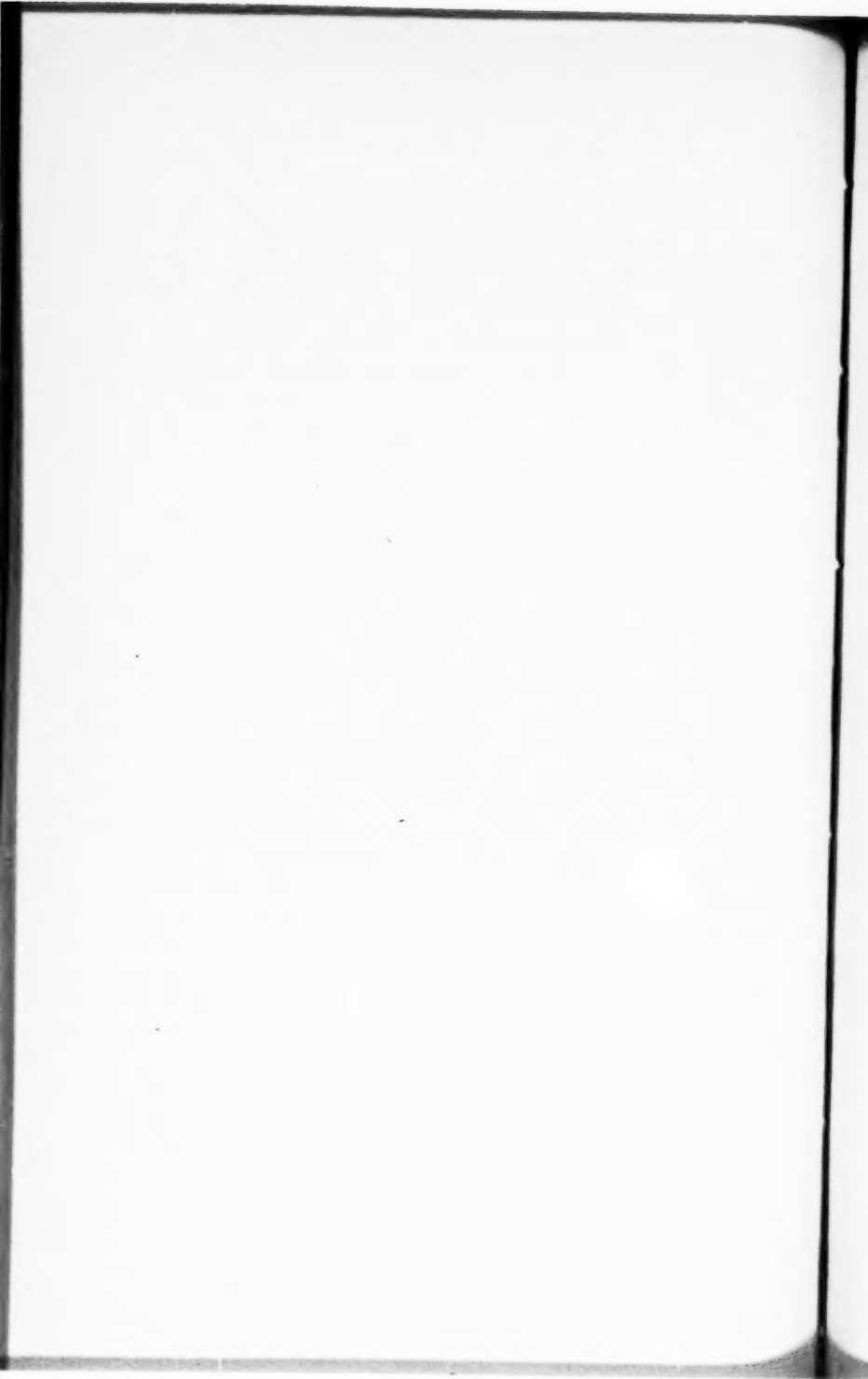
O. W. PRATT,

CYRUS CRANE,

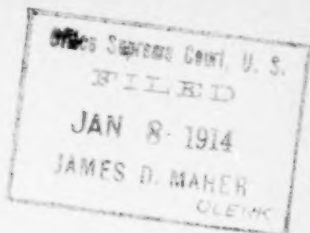
Attorneys for Plaintiff in Error.

JAS. H. MCINTOSH,

Of Counsel.



19



NUMBER 255.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF
IN ERROR,

VS.

RICHARD G. HEAD, JR., BY HIS NEXT FRIEND,
DEFENDANT IN ERROR.

**Statement, Motion to Dismiss the Writ of Error to the Mis-
souri Supreme Court for Want of Jurisdiction, Brief of
the Argument in Support Thereof, and Notice and
Service Thereof on Plaintiff in Error's Attorneys
of the Presentation of the Same to Said Court.**

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
W. P. BORLAND,
JAMES A. REED,
Attorneys for Defendant in Error.



NUMBER 255.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF
IN ERROR,

VS.

RICHARD G. HEAD, JR., BY HIS NEXT FRIEND,
DEFENDANT IN ERROR.

STATEMENT.

This was a suit in the Circuit Court of Jackson County, Missouri, by defendant in error against plaintiff in error, on a policy of life insurance issued by plaintiff in error in April, 1894. The policy was issued on the life of Richard G. Head, for Ten Thousand Dollars. The policy was payable to his infant son, Richard G. Head, Jr., in said case No. 254. Mary E. Head afterwards became the assignee of the policy. In No. 255, said Richard G. Head, Jr., was the plaintiff on a like policy issued at the same time. In each case there was a judgment for the full amount of the policy less a certain loan which had been made thereon, the judgment in each case being for about \$7500.00. Appeals from the State Circuit Court were taken by the Insurance Company to the Missouri Supreme Court, where the judgments of the Circuit Court were affirmed. The opinions of the Supreme Court are not only contained in the record now before this Court, but also are fully reported in *Head v. New York Life Insurance Co.*, 147 S. W. Rep., 827-832; *Head v. New York Life Insurance Co.*, 241 Mo. 403-420.

After these judgments of the Missouri Supreme Court affirming the judgments of the Circuit Court, the Insurance Company sued out writs of error to this Court, and the question on this motion is whether there is any federal question in the cases conferring jurisdiction on this Court.

In the State Circuit Court, each case was tried by the court without a jury. The principal question in the case in both state courts was, whether the policies were Missouri contracts governable by the laws of that state or were governable by the laws of the State of New York.

At the conclusion of all the evidence in each case, the court gave a declaration of law for the plaintiff, declaring that: "The policy of insurance in this action was and is a Missouri contract governable by the laws of Missouri in force at the time of the issuance of the policy, and not governable by the laws of the State of New York."

Defendant objected to this declaration of law and excepted to the giving of it by the trial court, assigning as the grounds of its exception: "That to apply the Missouri Statute and laws to the insurance contract in this case would violate and be in contravention of the rights of defendant under Article 1 of Section 10 of the Constitution of the United States and the Fourteenth Amendment thereof."

The court also declared, in another declaration of law: "That on the facts shown in evidence in this case, the plaintiff is entitled to recover and that the issues should be found in favor of plaintiff. Defendant objected and excepted to the giving of this declaration, for the same reason stated above.

The trial court gave a further declaration of law, No. 3, to the effect that plaintiff was entitled to a judgment against the Insurance Company for the amount of the policy of \$10,000, less the sum of \$2270.00, which had been loaned by the Company to defendant in error, and the Insurance Company saved the same exceptions to the giving of that declaration.

The Insurance Company filed a motion for a new trial in each case in the State trial court, and in said motion for a new trial the Insurance Company made an assignment as follows:

"12. Because the court erred in that by its ruling and holding that said contract of insurance was governed by the laws of the State of Missouri as said laws existed at the time said contract of insurance was executed, notwithstanding the fact that none of the parties to said contract were

residents or citizens of the State of Missouri, the court invaded and deprived this defendant of the rights guaranteed it under the Constitution of the United States of America, and especially its rights under Article 1, Section 10 of said Constitution, and Section 1 of Article XIV of the amendments of the Constitution."

This motion having been overruled, the Insurance Company took an appeal in each case to the Missouri Supreme Court. After the judgment of affirmance in both cases had been given in the Missouri Supreme Court, the Insurance Company filed a motion for rehearing in each case and assigned as grounds thereof that: "The decision of the court in this cause is in conflict with the Constitution of the United States and controlling court decisions."

This motion for a rehearing in each case having been overruled, the Insurance Company in each case sued out a writ of error to this court.

In the assignments of errors, the Insurance Company made the following assignment:

"1. Because the Supreme Court of the State of Missouri denied to the plaintiff in error a right, privilege and immunity to which it is entitled and which is guaranteed to it under and by Section 10 of Article 1 of the Constitution of the United States and under and by Section 1 of Article XIV of the amendments thereof in that the Supreme Court of the State of Missouri by its ruling and decision in said cause held that the contract of insurance sued upon and which was the basis of the action, was governed as to the amount due thereunder by the laws of the State of Missouri as said laws existed at the time said contract of insurance was executed and not by the terms of the written contract of insurance, notwithstanding the fact that neither the plaintiff in error, who was defendant in said action, nor any of the other parties to the said contract nor any person beneficially interested therein were residents or citizens of the State of Missouri at the time said contract was entered into nor at any time thereafter and also notwithstanding that the parties to said contract of insurance expressly agreed and wrote into said contract that the said contract should be governed and construed by and under the laws of the State of New York, of which state this plaintiff in error is and was a resident citizen."

Another assignment in the assignment of errors of the Insurance Company is as follows:

"3. Because the Supreme Court of the State of Missouri deprived the plaintiff in error of a right and immunity

to which it was entitled under Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment of said Constitution."

There are other assignments set forth in said assignments of error, couched in different language, but they each and all affirm the proposition that the error complained of under the Constitution of the United States was by the Supreme Court in its opinion. In none of the state courts nor in this court is there any complaint that the Missouri Legislature, after the issuance of the policy in each case, passed any law impairing the obligation of the insurance contracts or denying to the Insurance Company due process of law or depriving the Insurance Company of the equal protection of the laws. All of the specifications of assignment, both in the state court and in this court, are that the Insurance Company was denied its right under the Federal Constitution, by reason of the decision of the Supreme Court, in giving effect to laws that were in force in the State of Missouri at and before the time of the issuance of these policies.

For some years prior to the issuing of these policies, the plaintiff in error had a branch office at Kansas City, Missouri. All of the laws of Missouri which were given effect in these cases were in force when the Insurance Company came into the State of Missouri and obtained its license from the State of Missouri to do business at its branch office. The insurance laws of Missouri at the time that the Insurance Company obtained this license to do business in that state, provided that foreign companies thus licensed "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state and shall have no other or greater powers."

It is not denied but is admitted that the judgments in these cases were in conformity with the laws of Missouri relating to life insurance companies in force at and before the time of the issuance of these policies and at and before the time when this Insurance Company, on its own application, was licensed to do business as a foreign insurance company in the State of Missouri, at Kansas City, therein.

On facts very similar to the facts in the case at bar, the Supreme Court of Missouri, in the case of *Cravens v. New York Life Insurance Co.*, 148 Mo. 583, held that the policy sued on in that case was a Missouri and not a New York contract, although the policy provided there that New York should be deemed the place

of the contract and that the contract should be construed according to the laws of New York. In that case, as in the case at bar, the application for the policy was made in Missouri, the first premium was paid in Missouri and the policy was delivered in Missouri; and the Supreme Court held there, as it held in the cases at bar, that those facts made the policy a Missouri and not a New York contract, notwithstanding the stipulation of the parties in the policy.

"Such a contract being executed here, is subject to the laws of Missouri, anything in the contract to the contrary notwithstanding."

It was further adjudged in that case that:

"Foreign insurance companies which do business in this state, do so not by right but by grace, and must in doing so conform to its laws. Moreover the State may prescribe conditions upon which it will permit such companies to transact business within its borders or exclude them altogether, and in so doing violate no contractual rights of the company."

It was further adjudged that:

"A statute with respect to the subject matter in force at the time the contract is entered into within the State, becomes a part of the contract, as much so as if copied into it."

It was also adjudged in that case that,

"when no statute intervenes prohibiting it, a corporation doing business by permission in another state than that of its incorporation may by contract make the law of the State of its incorporation the applicatory law of the contract, but where the laws of the State in which it does business by license prohibits such corporation from making certain kind of contracts, it can act only in accordance therewith."

And this Insurance Company having been held liable on the policy in that case, it was removed by the Insurance Company to this United States Supreme Court. And this court in its opinion affirmed the said judgment of the Missouri Supreme Court. *New York Life Insurance Co. v. Cravens*, 178 U. S., 389. And the said propositions of the Missouri Supreme Court were approved.

The only difference between the said case of *Cravens* as decided both by the Missouri Supreme Court and by this court, consists in the fact that *Cravens* was a resident citizen of Missouri while said Richard G. Head and his family, including these two children who are plaintiffs in these actions lived, resided in and were citizens of New Mexico at the time of the taking out of these two policies for \$10,000.00 each.

It appears from the statement of facts in the Supreme Court decisions in these cases that Richard G. Head, to whom these policies were issued, often had business at Kansas City, Missouri; that being solicited by an agent of the defendant he gave an application for these two policies to said soliciting agent; that the application was sent to the New York Insurance Company through its branch office in Kansas City; that the two policies in these suits were thereupon transmitted by defendant to its branch office in Kansas City and delivered to Mr. Head in said Kansas City, and that the first premium was paid by Mr. Head in Kansas City. On these facts, the Missouri Supreme Court held that the policies were Missouri contracts. That court had decided to the same effect also in *Horton v. New York Insurance Co.*, 151 Mo. 604.

In these cases the court held that since the policy was delivered by the company through its branch office in Missouri, where the application was made and where the first premium was paid, it then on these facts became a binding contract, and that the mere mailing in New York of the policy to its agent in Missouri for delivery to the insured, did not make it a New York contract.

In the cases at bar, the policies each provided for the making of loans by the Insurance Company to the insured, and a loan was made on each of these policies in 1904, ten years after the issuance of the policies. It is claimed by the Insurance Company that these loans made in 1904, which provided the same as the policy that the loan contract should be a New York contract, is a new and binding contract, independent of the policy under which it was made, and that even if the original policy was a Missouri contract, the making of that loan converted the policies into New York contracts. And it was claimed in this connection that, computing the amount due on the policies according to New York laws, there was only the sum of \$89.00 due on the policy.

In said case of Cravens against this Company, decided by the Missouri Supreme Court and also by this court, it was held that such loan contracts as were made in the cases at bar could not avoid the provisions of the insurance laws of Missouri respecting the rights of policy-holders under the non-forfeitable statutes of Missouri. At the bottom of p. 604, in the opinion of the Missouri Supreme Court in the Cravens case, it is said:

"The question then is, could the parties themselves enter into a contract, either directly or indirectly, waiving the provisions of the statutes?

And that question was answered in the negative.

The same decision was made by the Supreme Court in the case of *Smith v. Insurance Company*, 173 Mo. 329. It was there decided again that these loan contracts, whatever provisions they might contain could not, directly or indirectly, change the rights of the parties under the policy construed as Missouri contracts when the policies were issued. This decision was in 1903, and this case was decided, as was the other cases heretofore referred to, by the Missouri Supreme Court, before the loan contracts in this case were made in 1904.

The same question was adjudged in like manner by the Missouri Supreme Court in the case of *Burridge v. New York Life Insurance Company*, 211 Mo. 158. In this last case the Missouri Supreme Court adjudged that:

"Where the loan and pledge were contemplated by the policy, they do not constitute a contract distinct and independent from the policy."

It was also adjudged in that case as follows:

"Neither at the time the policy is drawn and issued, nor by any supplemental subsequent contract in legal effect an amendment to the policy, such as a loan contract and pledge, is it permissible to whittle away the non-forfeiture statute requiring the net value of the defaulted policy to be applied to extended insurance."

The court expressly followed in this *Burridge* case its previous opinion in the case of *Smith v. Mutual Benefit Life Insurance Co.* These cases were all decided during the years when Mr. Head was paying the premiums on these two \$10,000 policies, and all of the foregoing decisions except the last one, in the *Burridge* case, were before the making of the loan contract, as we have seen.

The policies provided for twenty annual premiums, and much more than half of the premiums due for that twenty years had been paid prior to the death of Mr. Head.

In its opinion and judgments in these cases the Missouri Supreme Court did not decide any federal question. It held that when the defendant Insurance Company came into Missouri it was bound by its laws and that business transacted by its branch office in Missouri were Missouri contracts, and that the contracts in these cases were Missouri contracts. It held that the policies before delivery at the branch office in Kansas City, Missouri, were as much in the possession of the defendant as the policies would have been if they had been retained in New York. The court also held in its opinion that the fact of the residence of the Head family in New Mexico,

where there was no branch agency, did not make the case any different than if that family had lived in Missouri. The court holds on that point, that the benefits of the Missouri statutes are not only for those who live in Missouri, but are for the benefit also of those who come into Missouri, residing elsewhere, to transact business in that state. It held that the insurance legislation of Missouri was equally for the benefit of those policy-holders who might obtain policies at the Kansas City branch office, who lived in Missouri, and for the benefit also of those living elsewhere who might come to Kansas City to transact business, and in like manner take policies at the same branch office. The court also held that where the original policy contemplates the making of a loan, that that loan does not change the policy contract into a New York contract, but that all such loans as were made in this case are mere subsidiary contracts. The court in its opinion, on this branch of the case, said:

"It is not an open question in this state that all subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract and are not to be treated as independent agreements. This being so, they are inefficacious to alter, change or modify the writing and obligation that existed on the original contract of insurance."

It was also held that the tender and payment to the plaintiff of said \$89.00 did not extinguish the right of the plaintiff to recover the full sum of \$10,000, as provided in the policy, less the loan thereon, with interest. The court, on this branch of the case said:

"In other words, no tender nor payment of any sum less than the full amount of any unquestioned indebtedness will bar the party from prosecuting a suit for the entire amount due."

Under Missouri laws, plaintiff was entitled to a recovery of \$7,500, and the court held that the Insurance Company could not extinguish that demand by paying \$89.00.

The opinions and judgments in these cases are in perfect harmony with the preceding decisions of the Missouri Supreme Court in the cases cited above, which were promulgated during the time that Mr. Head was paying his premiums, and all of them, with one exception, before the making of the loan contract of 1904.

**MOTION TO DISMISS THE WRIT OF ERROR FOR WANT
OF JURISDICTION.**

And now comes the said defendant in error and moves the court to dismiss the writ of error herein for the reason that there is no federal question in this case and because this court is without jurisdiction in this case.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
W. P. BORLAND,
JAMES A. REED,

Attorneys for Defendant in Error.

BRIEF OF THE ARGUMENT.

I.

Where the federal question upon which the jurisdiction of the United States Supreme Court on the writ of error to the State Court is based grows out of an alleged impairment of the obligation of the contract by the decision of the State Court and not by a subsequent statute of the state legislature, such alleged impairment is not within the meaning of the Constitution, does not confer jurisdiction on the United States Supreme Court, and hence the writ of error in these cases should be dismissed.

R. R. Co. v. Rock, 4 Wall., 177.

Knox v. Bank, 12 Wall., 379.

People v. R. R. Co., 12 Wall. 455.

Sevier v. Haskell, 14 Wall. 12.

Water Co. v. Easton, 121 U. S. 388.

Waterworks Co. v. Refining Co., 125 U. S. 18.

Hopkins v. McClure, 133 U. S. 380-386.

Land Co. v. Laidley, 159 U. S. 103.

Bacon v. Texas, 163 U. S. 207.

Building Ass'n v. Braham, 193 U. S. 647.

Crosslake Club v. La., 224 U. S. 632.

Oshkosh Water Co. v. Oshkosh, 187 U. S. 437, 438, 446.

R. R. Co. v. Adams, 180 U. S. 41.

Gaslight Co. v. St. Paul, 181 U. S. 142.

Waterworks Co. v. La., 185 U. S. 336.

Turner v. Board, 173 U. S. 461.

The question whether these policies were Missouri or New York contracts was and is not a federal question, but is a question of general jurisprudence. But even if it had been a federal question, still the decision of that question does not in any view of the case constitute an impairment of the contracts sued on. That impairment can only be accomplished by a statute passed after the issuance of the policies and depriving the insurance company of some rights under those policies. All of the legislation of Missouri applicable to the cases of these policies was enacted long before the issuance of these policies, and were repeatedly construed, as we have seen, by the uniform decisions of the Missouri Supreme Court and by one decision by this court.

II.

Nor does the fact that Mr. Head with his family lived in New Mexico when these policies were issued make those policies any less Missouri contracts. The question of conflict of laws in all such cases, that is, whether a given contract is a New York contract or an Illinois contract or a Missouri contract, does not depend upon the citizenship or residence of the parties. It depends upon other and entirely different considerations. If it is desirable to consult the cases, the following may be referred to to show that the residence and citizenship of the parties does not enter into the situs of the contracts as to where they are made.

Milliken v. Pratt, 125 Mass. 374.

Golden v. Ebert, 52 Mo. 260.

Richardson v. DeGiverville et al., 107 Mo. 422.

Rube v. Buck, 124 Mo. 178.

Reed v. Western Union Tele. Co., 135 Mo. 661.

Horton v. New York Life Ins. Co., 151 Mo. 604.

Elliott v. Des Moines Life Association, 163 Mo. 132.

Thompson v. Traders Ins. Co., 169 Mo. 12.

Park v. Conn. Fire Ins. Co., 26 Mo. App. 511.

Hauck Clothing Co. v. Sharpe, 83 Mo. App. 385.

Pietri v. Sequenot Adm., 96 Mo. 258.

See as precisely in point:

Napier v. Ins. Co., 100 N. Y. Supp. 1072.

The close of Section 1 of the Fourteenth Article of the Amendments to the Constitution of the United States, provides as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. Head was certainly within the jurisdiction of the State of Missouri when he applied for these insurances, paid the first premiums and received the policies. He was within the jurisdiction of the State of Missouri and therefore entitled to the equal protection of its laws. This proposition has more than once been adjudged by this court. *Vick Wo v. Hopkins*, 118 U. S. 356, 569. In that case it was adjudged that the grounds of protection contained in the Fourteenth Amendment of the Constitution extended to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color or nationality.

So, in the case of *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, l. c. 209, this court said:

"Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed."

The rights of Mr. Head in this case are precisely the same as if he had been a resident of Missouri, the same as Mr. Cravens in his case.

See also:

Duncan v. Missouri, 152 U. S. 377.

Frazier v. McConway, 82 Fed. 257.

In that case, the Circuit Court of the United States for the District of Pennsylvania in its opinion, said:

"The equal protection of the laws declared by the Fourteenth Amendment of the Constitution, and enforced by the laws of the United States, is not confined to citizens, but secures to every person within the jurisdiction of the state exemption from any burdens or charges except such as are equally laid upon all others under like circumstances."

So in the case of *Templar v. Barber's Board of Examiners*, 131 Mich. 254, the Supreme Court of Michigan adjudged the following proposition:

"The provisions of Sec. 5 of the Barber's License Law (Act No. 212, Pub. Acts, 1899) that no alien shall be entitled to a certificate is repugnant to the Fourteenth Amendment of the Federal Constitution, as denying the equal protection of the laws."

So, in *Steed v. Harvey*, 18 Utah, 367, the Supreme Court of the State of Utah adjudged the following:

"The provision of the Fourteenth Amendment to the Constitution declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, secures to every person within the jurisdiction of the state, though not a citizen or even a resident, the protection of its laws equally with its own citizens and entitles him to the same remedies."

The same proposition was adjudged in the case of *Pearson and Wife v. City of Portland*, 69 Me. 278. That was an action to recover damages by the plaintiff, Mrs. Pearson, for injuries from a defective way in said City of Portland. The plaintiff, Mrs. Pearson and husband were residents of Cuba and had no residence in the State of Maine. ~~They only had a residence in the State of Maine for~~ They were only there for temporary business purposes. In that State there was a statute which provided, as follows:

"No person shall recover of any city or town in this state, damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, town-way, causeway or bridge, provided the said damage be done to or claimed by any person, who was at the time said damage was done a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country."

The Supreme Court of Maine held that statute to be unconstitutional. In its opinion the court said that the above statute was in conflict with the Fourteenth Amendment of the United States Constitution; that by the general statutes in force before the passage of that act, every person sustaining an injury, in person or property, through any defect or want of repair, in any highway, could recover for the same, in an action on the case, against the town, city or county. And in the opinion the court said:

"This is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their highways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. And it is universal in its application. It protects every one alike. The Act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this state at their peril, and without that protection which the law affords to all others. * * * The general statute may undoubtedly be repealed; but the court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the state it must remain in force for the protection of all similarly situated. The plaintiff was within the jurisdiction of the state at the time of her injury."

So in the cases at bar, we submit that Mr. Head, being within the jurisdiction of the State of Missouri when and where the contract of these policies was made, the insurance laws which governed in these cases were as much for his protection as if he had been living in the State of Missouri. However, this question of the right of Mr. Head under the Fourteenth Amendment to receive the same benefit and protection under the laws of Missouri as if he had lived in the State, was not passed upon by the Missouri Supreme Court in these cases.

The court in effect held that it never had been the policy of the law making power in Missouri or of its courts to discriminate against residents of other states or countries, and had never fa-

vored a policy which held that non-residents were not entitled to the same protection of our laws as residents of Missouri, and it held that the insurance laws on which these judgments were based did not manifest any intention on the part of the legislature framing those laws, to discriminate against citizens of other states. The Missouri Supreme Court, in the concluding clause of the paragraph of its opinion covering this point, used this language:

"We therefore overrule the contention that the legislature had an express purpose to exclude strangers within our gates from the protection of our laws."

But even if the court had expressly decided that Mr. Head in receiving these policies was entitled to the same rights as if he were a citizen of Missouri, by virtue of said paragraph of the Fourteenth Amendment of the Constitution of the United States and had expressly based that part of its decision and judgment on that ground, still the Insurance Company would not have a right to have that question reviewed on this writ of error, for the reason that it is only in cases where the federal right claimed is denied that jurisdiction of the Supreme Court of the United States on a writ of error to a state court exists. On this branch of the case, the Insurance Company does not claim under the Fourteenth Amendment. As we have seen, the Missouri Supreme Court did not pass on this federal question. It construed the Missouri legislation to apply to non-residents as well as to residents. The State Supreme Court held the legislation of the State to apply to all persons within its jurisdiction, whether they were residents or non-residents. If the State Supreme Court had decided against the children of Mr. Head on the ground that they were not within the protection of the Missouri laws because their father was a resident and citizen of another state or territory, possibly they might have the right to invoke the jurisdiction of this court on the ground of the denial of their right to the same treatment as citizens of Missouri. But we have no such case. The court did not pass upon the question of the status of the Heads by virtue of the Fourteenth Amendment, one way or the other, but held that they were within the scope and purpose of the Missouri statutes, the same as residents and citizens of that State.

III.

It is not denied that both the Circuit Court of Jackson County, Missouri, at Kansas City, and the Missouri Supreme Court in these cases had jurisdiction to decide the questions decided there-

in, and any errors or irregularities which might have been committed by either of those courts does not create an absence of due process of law, and the writs of error in these cases cannot be maintained on the due process of law clause of the Fourteenth Amendment.

Kentwood v. La., 92 U. S., 480-483.
Davidson v. New Orleans, 96 U. S., 97-105.
Head v. Mfg. Co., 113 U. S., 9-26.
R. R. Tax Cases, 115 U. S., 321.
Marrow v. Brinkley, 129 U. S., 178.
Morley v. R. R. Co., 146 U. S., 162.
Traction Co. v. R. R. Co., 151 U. S., 137.
Marchant v. R. R. Co., 153 U. S., 380.
Bergman v. Barker, 157 U. S., 655.
Land Co. v. Laidley, 159 U. S., 103.
Castillo v. McConnico, 168 U. S., 654.
Lynde v. Lynde, 181 U. S., 183-186.
R. R. Co. v. Schmidt, 177 U. S., 230-236.
Arrowsmith v. Harmoning, 118 U. S., 194.
G. & E. O. v. Gaidley, 159 U. S., 194.
Fayerweather v. Rich, 91 Fed. Rep. 721; 34 C. C. A., 61.

IV.

As to the point of "equal protection of the laws," it is the settled law of the United States Supreme Court that laws may relate solely to a subject, such as laws affecting railway companies.

Mo. Pac. Ry. Co. v. Mackey, 127 U. S., 205-209.
R. R. Co. v. Matthews, 174 U. S., 96-105.

And also laws which affect insurance companies.

Ins. Co. v. Dagg, 172 U. S., 557-562.

V.

We have thus considered all the objections made by counsel growing out of the impairment obligation and the contract clause and the due process of law and equal protection of laws clauses of the Federal Constitution. No other federal question is presented, and of course no other federal question not raised in the state courts can for the first time be raised here.

Chapin v. Fye, 179 U. S., 127.
Bridge Co. v. Ill., 175 U. S., 633.
Ry. Co. v. Hackett, 228 U. S., 550-560.

*To Messrs. Gardiner Lathrop, Thomas R. Morrow, John M. Fox,
Samuel W. Moore, O. W. Pratt and Cyrus Crane, Attorneys
of the Plaintiff in Error, New York Life Insurance Company:*

Please take notice that the foregoing motion to dismiss the writ of error in said cause for want of jurisdiction, together with the foregoing statement of facts and brief of the argument in support of said motion, together with this notice, will be presented to said United States Supreme Court, in open session, on Monday, the 19th day of January, 1914, and said cause will be submitted to said court on said motion, statement and brief, at that time, at the opening of said court or as soon thereafter as counsel can be heard.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
W. P. BORLAND,
JAMES A. REED,
Attorneys for Defendant in Error.

Received a copy of the foregoing Statement, Motion to Dismiss Said Writ of Error and Brief of the Argument in Support Thereof, together with a copy of the foregoing Notice, this 24th day of December, 1913.

LATHROP, MORROW, FOX & MOORE,
O. W. PRATT,
CYRUS CRANE,
Attorneys for Plaintiff in Error.

MAR 9 1914

JAMES D. MAHER

CLERK

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW-YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

RICHARD G. HEAD, JR., BY HIS NEXT
FRIEND, *Defendant in Error.*

No. 255

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GARDNER LATHROP,

CYRUS CRANE,

O. W. PRATT,

Solicitors for Plaintiff in Error.

JAMES H. McINTOSH,

Of Counsel.



—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW-YORK LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

RICHARD G. HEAD, JR., BY HIS NEXT
FRIEND, *Defendant in Error.*

No. 255

REPLY BRIEF FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT,—

Counsel for Head in their brief have made so many claims for us we do not make for ourselves and have so far missed the claims made by us that in order to avoid any chance of a misunderstanding, I have thought I ought, by way of reply, to summarize both the facts and the law as we understand them.

Summary of the Facts.

I.

Head, a citizen of New Mexico, domiciled at Watrous, and the New-York Life Insurance Company, a citizen of New York, domiciled at New York City, met in another state and

made a contract with each other. The state they met in happened to be Missouri, but in their negotiations they took this fact into account and disposed of it by agreeing that their contract should (p. 28) "be construed according to the laws of the State of New York, the place of said contract being agreed to be the Home Office of said Company in the City of New York".

II.

Their contract of life insurance called for the annual payment of premiums (p. 24) "at the Home Office of the Company". Each paid premium gave accumulated value to the policy. After the payment of five premiums the insured might borrow its accumulated value, provided (p. 23) "the policy shall be duly assigned to the Company as collateral security for the loans and deposited at the Home Office".

III.

April 3, 1904, Head obtained the maximum loan on the policy and duly assigned the policy to the Company as collateral security for the loan and deposited it at the Home Office. The loan was evidenced by a loan agreement which provided (p. 81),—

"If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount, in accordance with Section 88, Chapter 690 of the Laws of 1892 of the State of New York."

IV.

The premium due April 3, 1905, was not paid. The policy provides for non-forfeiture benefits (p. 26) in the event of non-payment of premium, but these benefits are only available (p. 38) "Provided there is no indebtedness against the

policy. (Pursuant to the Insurance Law, Chapter 690, Laws of 1892 of the State of New York.)”

V.

After said non-payment of premium, the Company duly endorsed the policy for its full value in paid-up insurance after deducting the indebtedness from the reserve, all in strict accord with “The Insurance Law, Chapter 690, Laws of 1892 of the State of New York”, (p. 54) Section 88, and sent the endorsed policy to the owners of it. When it received proofs of death it duly tendered payment of the amount of this paid-up insurance.

VI.

That the Company has offered to perform this contract according to its terms as contained in the policy and in strict accord with the laws of New York, is not disputed. Notwithstanding the due cancelation of this debt and of the policy, and its endorsement for paid-up insurance and its return as so endorsed, Head has recovered the full face of the policy, less the amount of the loan, on the ground that a non-forfeiture law of Missouri which, as construed by the Missouri courts, differs from the non-forfeiture law of New York, replaces and supersedes the non-forfeiture provisions of the policy and of the Laws of New York, and controls the rights of the parties in spite of themselves because they happened to meet in Missouri when they made the contract, although they were both non-residents of Missouri, one domiciled in New Mexico and the other in New York, and agreed in their contract that it should be governed by the laws of the domicile of one of them, namely by the laws of New York.

SUMMARY OF THE LAW.

I.

The agreement in the policy, that in case of a loan "The policy shall be duly assigned to the Company as collateral security for the loans and deposited at the Home Office", necessarily implies and requires the pledge of the policy upon such terms and conditions as shall make the Company secure and give it the right to satisfy the debt by foreclosing the pledge in a proper case.

II.

The Missouri statute as construed by the Missouri court in the *Smith* and *Burridge* cases and in this case, is unconstitutional because,—

1. It deprives the owner of the policy of the right
 - (a) To make such proper use of it as he sees fit; or
 - (b) To dispose of it upon such terms and under such conditions as may be satisfactory to him.
2. It deprives the Company as a money-lender of the right
 - (a) To take adequate collateral security for money loaned; or
 - (b) To enforce the collateral security contract.

3. It denies the Company the equal protection of the law, because it does not accord to it as a money-lender the same rights and remedies accorded to every other money-lender.

Suppose the policy-holder, instead of borrowing money from the Company had borrowed from some other money-lender, say a Bank, and had duly assigned the policy as collateral security, authorizing the lender in the event of default to foreclose the security by charging the debt against the reserve on the policy and paying the debtor the excess, if any,—would this be a violation of the Missouri Statute? Not at all.

But this same agreement made with the Company as a money-lender the Missouri Court holds is contrary to the statute and void.

In other words, the policy-holder may use the value of the policy to secure or pay a debt in dealing with any person except the Company. But in dealing with the Company he cannot use the value of the policy to secure or pay a debt to it unless, and only unless, the debt was incurred for money borrowed to pay premiums on the policy.

4. It deprives the Company of its property without due process of law by compelling it to give the policy-holder extended insurance for money which the policy-holder has already obtained from it.

5. It violates the constitutional guaranty of liberty by prohibiting the policy-holder from making a proper use of his own property, and the Company from collecting its debt.

Allgeyer v. Louisiana, 165 U. S., 580.

Adair v. United States, 208 U. S., 161.

Lawton v. Steele, 152 U. S., 137.

6. The Missouri statute as so construed cannot be justified as an exercise of the police power, because it imposes unusual and unnecessary restrictions upon the natural right of both parties to make with each other and to enforce a contract that is fair, just and proper in all its terms.

Lawton v. Steele, 152 U. S., 137.

Adair v. United States, 208 U. S., 161.

Lochner v. New York, 198 U. S., 46.

Zellmer v. Krentzberg, 114 Wis., 530.

7. It is no answer to say that Missouri may impose any conditions it pleases on the right of a foreign corporation to do business in the State. For,—

(a) This is not a statute relating to foreign corporations alone, or imposing conditions for doing business in the

State. It is a general statute applying to all life insurance corporations. Every disability this statute as so construed imposes on the parties to this contract it also imposes upon the parties to a like contract if made between a Missouri corporation and a resident of that State.

(b) But in any event the right to impose conditions upon a foreign corporation relates to the doing of business in the State with the citizenship thereof. If a representative of a foreign corporation happens to meet a resident of another State in Ohio, the State of Ohio has no power that I know of to keep them from dealing with each other in any proper way they please, unless the transaction is about property located in Ohio.

III.

The rule that impresses the public policy of a State upon contracts made therein, relates only to contracts to which a resident or citizen of the State is a party. The public policy of a State, in so far as it impresses itself upon contracts, is for the benefit and protection of residents and citizens of the State and has nothing to do with residents and citizens of other States.

IV.

Head of New Mexico and the Company of New York in dealing with each other anywhere had a perfect right to agree with each other that their engagements should be controlled by the laws of the domicile of one of them to the exclusion of the laws of Missouri where neither was domiciled.

V.

The loan agreement Head signed in New Mexico and mailed it and the policy to New York; in exchange for them he received (p. 70) "this third day of April, 1904, the sum of twenty-two hundred and seventy dollars from the New-York Life Insurance Company at the City of New York."

This anyhow was not a Missouri transaction. Under the laws of New Mexico and of New York it was a valid and proper contract of commercial pledge. Head thereby having duly pledged his policy with the Company at New York as collateral security for a loan, and the Company having duly foreclosed this commercial pledge, all in strict accord with the contract and to the laws of New Mexico and of New York, the transaction thereby ended, except as the results of the pledge foreclosure gave Head paid-up insurance. The laws of Missouri cannot now come into such a commercial transaction, go behind it, and breathe vitality into a policy which the parties to the contract had duly closed out by the one paying and the other receiving its full value.

Respectfully submitted,

GARDINER LATHROP,

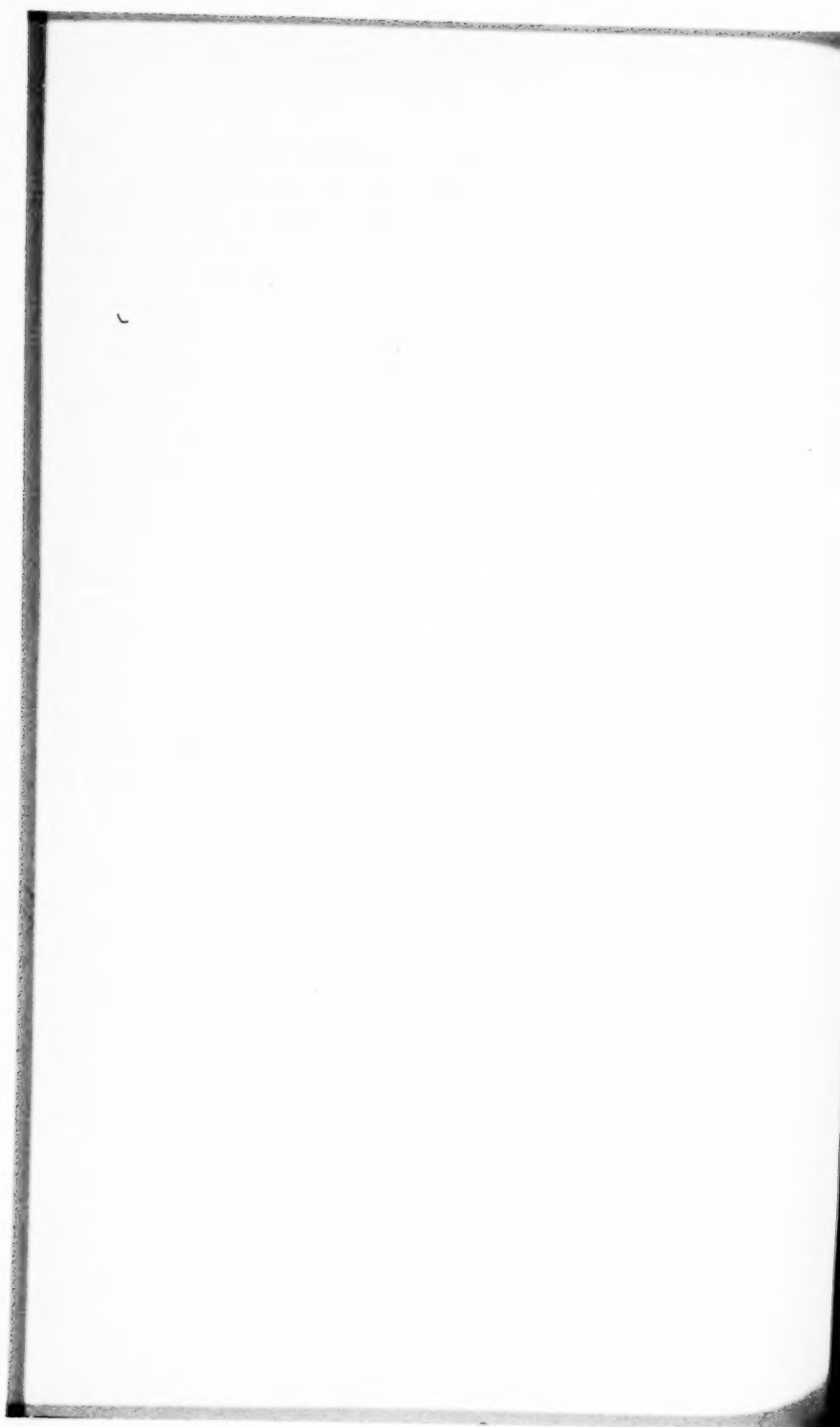
CYRUS CRANE,

O. W. PRATT,

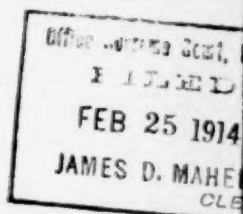
Solicitors for Plaintiff in Error.

JAS. H. McINTOSH,

Of Counsel.



21
NUMBER 255.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1913.

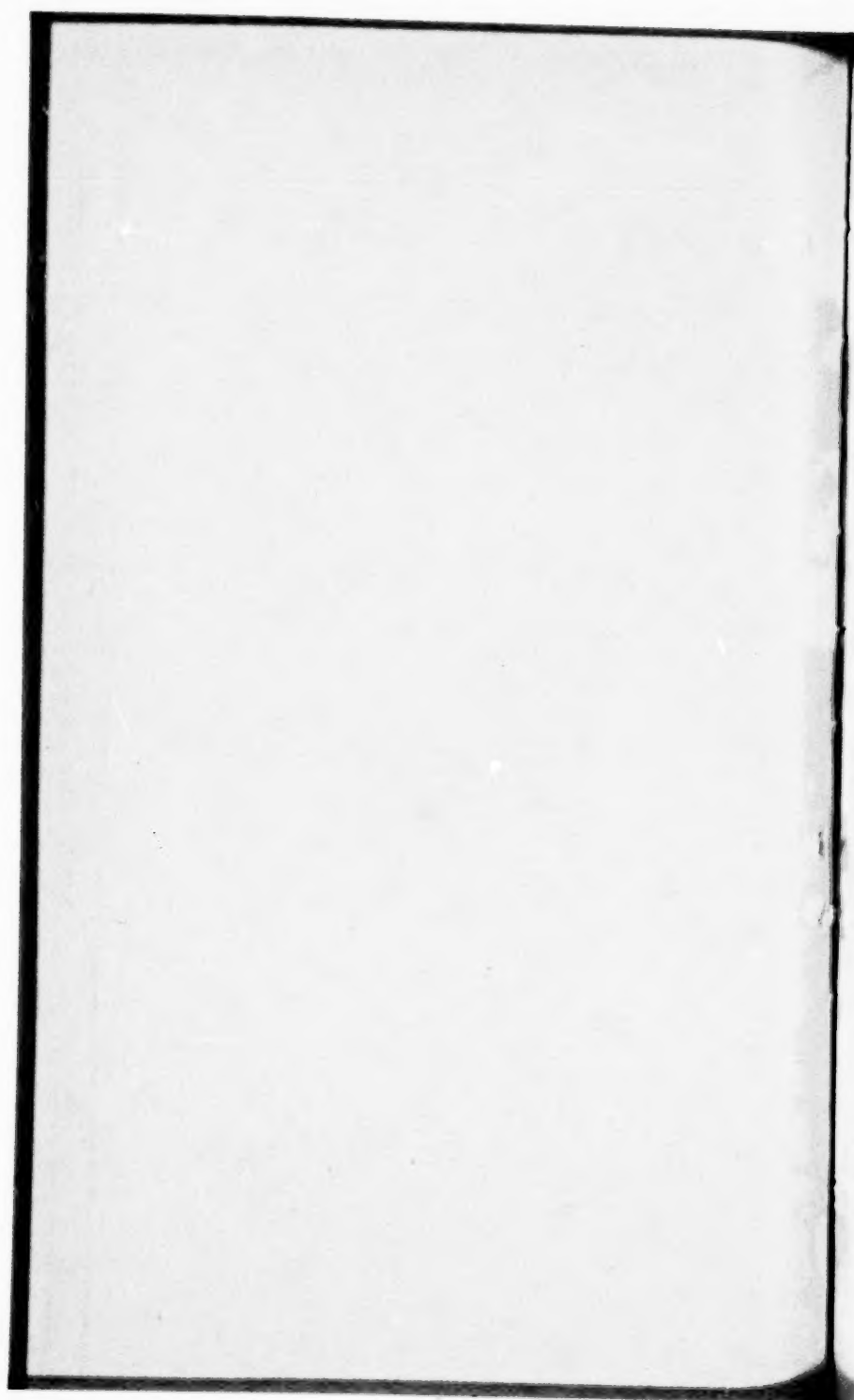
NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF
IN ERROR,

VS.

RICHARD G. HEAD, JR., BY HIS NEXT FRIEND,
B. F. DEATHERAGE, DEFENDANT
IN ERROR.

**STATEMENT OF THE CASE, BRIEF OF THE ARGU-
MENT AND ARGUMENT FOR DEFENDANT
IN ERROR.**

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
Attorneys of Defendant in Error.



INDEX.

Subjects.

	Pages
Statement of the Case	1 to 16
Motions to Dismiss Writs of Error	1 and 76
Non-Forfeiture, Mo. Stat. Sec. 5856	2
Paid Up Policy, Mo. Stat. Sec. 5857	2 and 3
Payment on Commuted Policy, Sec. 5858	3
Same Statutes in 1879 and 1899	3
Statute Applicable to Foreign Corporations	3 and 4
Provisions of Policies as to Payment of Premiums in Advance	9-10
Provisions of Policies Limiting Powers of Agents	9
Provisions of Policies as to Grace	9
Provisions of Policies as to Loans	11
<i>Stare Decisis</i>	4-12-55-56-65-70
Analysis of Judgments	13-14-15-16-42 to 44-73
License to Defendant to do Business in Missouri	5-6-7
Request for Paid-up Insurance	14-66-63 to 74
Testimony of Miss Head	15-16-21-72
Policies Are Missouri Contracts	7-8-22-24-26 to 28
Brief of the Argument	17 to 25
Amount of Premiums Paid	10-11
Defendant Same as a Missouri Corporation	5-17-36
Assured and Plaintiffs same as if they had lived in Missouri	17-18-19-28 to 37
Residence of Parties does not determine <i>lex loci</i> <i>contractus</i>	19-20-28 to 37
\$89 will not pay \$7500	20-21
\$89 not the amount fixed by the Mo. Paid-up Policy Statute	21-22-44 to 48
Relations between these Plaintiffs and Defendant Fiduciary which avoid loan contracts as not conscionable	24-25-54 to 63
To discriminate against Plaintiffs because they are non-resi- dents of Missouri would violate 14th Amendment of U. S. Constitution	38 to 42
Provisions of Policies and Loan Contracts making N. Y. Laws govern, void under Missouri Insurance Laws	11-12-23-42 to 44-54 to 63
Loans not New Contracts and invalid to affect Policies	11-12-23-48 to 50
Giving personal note to Magill not a payment of prem- iums	10-50 to 53

	Pages
Act of 1903 does not operate retrospectively on these policies issued in 1894	23-49-53-54
Argument	26 to 76
Sec. 5859 R. S. 1889	63 to 74
Proviso of 1895	64
Legislative Construction	64
Sec. 7900 R. S. 1899	64-65
No plea of Estoppel in this case and no Estoppel	46-47-70-71-72
As to effect of New Mexico Probate Court proceedings	74-75
The only contract whose obligation is sought to be impaired is defendant's contract with the State of Missouri to be governed by its laws	75-76
The loan contract in the policy was complete without the new so-called loan contract and would have been actionable in favor of the Heads if the company had refused the loans	75-76
This is not an ordinary life policy but a limited life policy	65-66

Authorities Cited.

Andrus vs. Insurance Ass'n, 168 Mo. 151	25
Burridge vs. N. Y. Life Ins. Co., 211 Mo. 403	4-12-22-23-26-43-49-54-68
Cravens vs. N. Y. Life Ins. Co., 148 Mo. 583	4-22-26-43-61
Same Case, 178 U. S. 389	4-22-26-43-61
Clothing Co. vs. Sharpe, 83 Mo. App. 385	20-32
Cyc. Law & Proc., Vol. 1, p. 319	20
Capp vs. Ins. Co., 94 S. W. 734	22-26
Christenson vs. Ins. Co., 152 Mo. App. 55	23-49-54
Chemical Co. vs. Lackawana, 100 Mo. App. 164	34
Crossman vs. Lurman, 192 U. S. 190	35
Duncan vs. Missouri, 152 U. S. 377	19-39
Depas vs. Mayo, 11 Mo. 314	29
Dennis vs. Mod. Brother, 119 Mo. App. 210	35
Elliott vs. Ins. Co., 163 Mo. 132	20
Equitable Life vs. Clements, 140 U. S. 226	22-26
Frazer vs. McConway Co., 52 Fed. Rep. 257	19-40
Golden vs. Ebert, 52 Mo. 260	20-29
Gillen vs. N. Y. Life Ins. Co., 161 S. W. Rep. 667	70-72
Horton vs. N. Y. Life Ins. Co., 151 Mo. 604	4-20-22-24-26-27
Holden vs. Hardy, 169 U. S. 366	24-58
Havens vs. Ins. Co., 123 Mo. 403	24

	Pages
Henry vs. Evans, 97 Mo. 47.....	24
Houghtaling vs. Ball, 19 Mo. 84.....	29
Ins. Co. vs. Russell, 77 Fed. 94.....	22-26
Ins. Co. vs. Twyman, 92 S. W. 335.....	22-24-26-61
Ins. Co. vs. Daggs, 172 U. S. 557.....	25
Ins. Co. vs. Simons, 52 Mo. App. 357.....	31
Johnston vs. Gawtry, 11 Mo. App. 322.....	30
Johnson vs. Bank, 116 Mo. 574.....	46
Joyce on Ins., Sec. 194.....	22-26
Karnes vs. Ins. Co., 144 Mo. 413.....	24-58
Moore vs. Ins. Co., 112 Mo. App. 696.....	22-26
Milliken vs. Pratt, 125 Mass. 374.....	20-28
Napier vs. Ins. Co., 100 N. Y. Supp. 1072.....	19-22-26
Narramore vs. Ry. Co., 96 Fed. 298.....	25
Pearson vs. City of Portland, 69 Me.	19-40
Park vs. Ins. Co., 26 Mo. App. 511.....	20-30
Pietri vs. Seguenot, 96 Mo. 258.....	20
Paschedag vs. Ins. Co., 155 Mo. App. 185.....	69
R. R. Co. vs. Mackay, 127 U. S. 205.....	19-39
Richardson vs. DeGiverville, 107 Mo. 422.....	20
Ruhe vs. Buck, 124 Mo. 178.....	20
Reed vs. Telegraph Co., 135 Mo. 66.....	20
Riley vs. Kershaw, 52 Mo. 224.....	21
Raymond vs. Ins. Co., 86 Mo. App. 391.....	70
Scudder vs. Bank, 91 U. S. 406.....	27
Smith vs. Ins. Co., 173 Mo. 329.....	4-23-24-26-43-48-59-63
Steed vs. Harvey, 18 Utah, 367.....	19-40
Swofford vs. Gass, 65 Mo. App. 55.....	21
Standard Oil Co. vs. Hawkins, 74 Fed. 395.....	46
State vs. Ins. Co., 152 Mo. 1.....	24-57
State vs. Cantwell, 179 Mo. 245.....	24-58
Schell vs. Ins. Ass'n, 150 Mo. 103.....	30
Summers vs. Ins. Aid Ass'n, 84 Mo. App. 605.....	34
Segrist vs. Crabtree, 131 U. S. 287-289.....	52-53
Templar vs. Barbers Board, 131 Mich. 254.....	19-40
Thompson vs. Traders Ins. Co., 169 Mo. 12.....	20
Vila vs. Portingues, 12 Wall., 339.....	24-56
Whitfield vs. Ins. Co., 205 U. S. 489.....	22-26
Wilson vs. Drumrite, 21 Mo. 325.....	24-55
Wetmore vs. Crouch, 150 Mo. 671.....	21
Yick Wo vs. Hopkins, 118 U. S. 356.....	19-38

NUMBER 255.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF
IN ERROR,

VS.

RICHARD G. HEAD, JR., BY HIS NEXT FRIEND,
B. F. DEATHERAGE, DEFENDANT
IN ERROR.

STATEMENT.

We first call attention to our motion to dismiss the writs of error herein with statements and briefs which are also submitted.

The two policies of life insurance in these two cases No. 254 and 255 were issued by defendant, New York Life Insurance Company, in 1894. Richard G. Head was the insured and his infant son, Richard G. Head, Jr. was the beneficiary in both policies. The policy in No. 254 was afterwards assigned to plaintiff therein Mary E. Head, a daughter of said Richard G. Head. The two suits were brought in the Circuit Court of Jackson County at Kansas City, Missouri, where judgments for plaintiffs were given against said company in both cases for the amounts of the policies less loans which had been made thereon. Afterwards on appeals to the Missouri Supreme Court by the insurance Company both judgments were there affirmed whereupon both cases were brought to this court by writs of error sued out by said company. At the time of the issue of these policies there were in force in Missouri the following insurance statutes being Sections 5856-5857 and 5858 of Vol. 2 of the Mo. Rev. Stat. of 1889, pp. 1385-1386, viz.:

Sec. 5856. POLICIES NON-FORFEITABLE, WHEN.

No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual payments, be forfeited or become void, by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to-wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the American experience table of mortality, with four and $\frac{1}{2}$ per cent interest per annum, and after deducting from three-fourths of such net value, *any notes or other indebtedness to the company given on account of past premium payments on said policies*, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of the original term of endowment, if the insured shall then be alive (2 R. S. 1889, Sec. 5856 amended-r p. 1385).

Sec. 5857. A PAID-UP POLICY MAY BE DEMANDED, WHEN.

At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of a policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and $\frac{1}{2}$ per cent per annum, *without deduction of indebtedness on account of said policy*, will purchase, applied as a single premium upon the table rates of the company, and in the case of a limited

payment life policy, or of a continued payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid: *Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and provided further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company (2 R. S. 1889, Sec. 5857, amended-s p. 1386).*

Sec. 5858. RULE OF PAYMENT ON COMMUTED POLICY. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in Section 5856, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, *the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured, and provided also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid (2 R. S. 1889, Sec. 5858-t p. 1386).*

These statutes were originally enacted in 1879, Vol 2, Missouri Rev. Stat. 1879, pages 1170-1171, Sections 5983, 5984 and 5985, and the same sections were continued in force in the revised statutes of 1899, Vol. 2, Mo. Rev. Stat. 1899, p. 1842, Sections 7897-7898 and 7899. The company had a branch office at Kansas City, Mo. and said policies were applied for, and issued by said company to and the first premiums paid by Mr. Head all to and by said company at its said Kansas City branch office. Said insurance laws were in force at the time of said transactions and during the years following during which Mr. Head paid the premiums on said policies and they were in force long prior to the

time when said company came into Missouri and obtained a license from that state to do business therein, according to the laws of that state.

At the time defendant obtained its license to do business in Missouri it became subject to said sections of its insurance laws by virtue of a Missouri statute which provided that foreign companies thus licensed "shall be subject to all the liabilities re-" "strictions and duties which are or may be imposed upon corpo-" "rations of like character organized under the laws of this state" "and shall have no other or greater powers."

The principal question in these cases is whether these policies were, when issued and delivered, Missouri contracts governable by the laws of that state or by the laws of New York. On facts similar to those of these cases the Missouri Supreme Court in the case of *Cravens v. New York Life Insurance Company*, 148 Mo. 583, held that the policy therein was a Missouri and not a New York contract although the policy in that case provided, the same as in the cases at bar, that the policy should be governed by the laws of New York. The judgment of the Missouri Supreme Court in that case was affirmed by this court. *New York Life Insurance Company v. Cravens*, 178 U. S. 389. See also to the same effect *Horton v. Ins. Co.*, 151 Mo. 604, and *Smith v. Ins. Co.*, 173 Mo. 329. These cases of *Cravens*, *Horton* and *Smith* were decided by the Missouri Supreme and this court, while Mr. Head was paying the premiums on the policies in these two cases. See also to the same effect *Burridge v. New York Life Ins. Co.*, 211 Mo. 158. On the basis of the maxim of *stare decisis* those decisions were followed by the Missouri Supreme Court in its opinions in these cases. See *Head v. New York Life Ins. Co.*, 147 S. W. Rep. 827-832; *Head v. New York Life Ins. Co.*, 241 Mo. 403-420. See same opinion in the record herein (No. 254, pages 141-151), No. 255, pages 106, 109).

These two cases, although based on two separate policies of life insurance held by two plaintiffs, are companion cases and were tried together in the trial court. The first case here is No. 254 and the second case is No. 255. In the first case, No. 254, Mary E. Head is defendant in error and plaintiff, and in the second case, No. 255, Richard G. Head, Jr., by his next friend, is defendant in error and plaintiff. For convenience we will, in this statement, brief and argument, speak of the first case as the Mary E. Head case, and the second case as the Richard G. Head, Jr., case. The two cases were tried by the trial court without a jury.

The two policies sued on in the two cases were issued by defendant for \$10,000.00 each on one single application for the two insurances, made by Richard G. Head, whose life was insured for the above amount in each policy, payable to his son, Richard G. Head, Jr. The application for the two policies was dated March 24, 1894. That application appears at page 25 in the Mary E. Head record and at page 27 in the Richard G. Head, Jr. record. That application shows that the applicant for the insurance and the insured in the policies, Richard G. Head, was born in Missouri, and that at his nearest birthday at the time of his application he was forty-seven years old; that he was married; that he had three other insurance policies in the defendant company, for \$10,000.00 each, amounting in all to \$30,000.00. The application was for twenty-year policies, that is, policies that would be paid for by twenty annual premiums.

The defendant had a branch office at Kansas City, Missouri, and that branch office was in the company's building in Kansas City, Missouri, known as the New York Life Building. The defendant, although a corporation of New York, had its branch office at Kansas City, Mo., pursuant to the laws of Missouri respecting the doing of business in Missouri by foreign corporations, and was licensed to do business in Missouri prior to the making of said application and the issue of the policies sued on herein. The certificate of the Superintendent of Insurance of Missouri, which certifies and shows that the defendant was duly licensed to transact business in the State of Missouri during the year 1894 and has been continuously so licensed from that year, may be found at page 45 of the Mary E. Head record and at page 31 of the Richard G. Head, Jr. record. It thus appears that by that license defendant was granted permission to do business in the State of Missouri. The defendant thereby became subject to and thereby agreed to be bound by all of the insurance laws of the State of Missouri applicable to life insurance companies, and by reason of that license and the laws of Missouri, defendant occupied no other or different position than if it had been incorporated under the laws of Missouri. The question, therefore, whether this application for insurance and these policies based thereon were and are Missouri contracts, is the same as if the defendant company had been chartered by the laws of Missouri. If the defendant had been chartered or created a corporation under the laws of Missouri, with its home office in

St. Louis, and a branch office at Kansas City, its position respecting these contracts and the question whether these contracts are Missouri contracts would be the same as in the cases at bar. The defendant, in obtaining its license to do business in the State of Missouri and in the establishing of its branch office at Kansas City, did so with a view of not only doing business with the citizens and residents of Missouri, but also with reference to obtaining policies from people who reside in states and territories in the southwest, having business relations with and at Kansas City.

It appears that defendant maintains throughout the United States branch offices at different points. This appears from the testimony of Edward A. Anderson, the defendant's comptroller (Mary E. Head Record, pp. 44, 75; Richard G. Head, Jr., Record, pp. 32-33). These branch offices were each under the charge of an agency director and a cashier, the agency director having principal charge. Under the superintendence of such agency director and cashier, were insurance solicitors who received applications and afterwards delivered the policies to the applicants and collected the premiums. These solicitors are agents of the company. The establishment by defendant of its branch office at Kansas City, Mo., was, as already stated, pursuant to the laws of the State of Missouri and the license of the State of Missouri authorizing defendant to do business in Missouri. But the purpose of its establishment of its branch office at Kansas City, Mo., was not only to do business with citizens and residents of Missouri, but it transacted business at its branch office at Kansas City, Mo., with and issued policies to persons who resided in New Mexico, Texas, Arkansas, and other parts of the southwest.

There is nothing in these records to show that the defendant at its branch office in Kansas City, Mo., did business with the applicants for insurance at that branch and the policy holders to whom policies were there issued on those applications any differently where the applicants chanced to reside in Kansas or in other states or territories of the Southwest, from its methods of doing business with the applicants for insurance at said branch who chanced to reside within the limits of the State of Missouri. Its methods of transacting the business, and the contract rights of the policy holders were the same whether the applications made at said branch and the policies delivered at said branch were by and to citizens and residents of Kansas and other states and territories of the southwest, or whether they were citizens and residents of Missouri.

Although said applicant and insured, Richard G. Head, lived in the Territory of New Mexico, it appears that the defendant at that time had no branch office in New Mexico where it could do business with Mr. Head, or where it could solicit his insurance or deliver to him any policies at the time the policies sued on were issued. Nor is there anything in the record showing that the defendant ever complied as a foreign corporation with the laws of Kansas, or any of the other southwestern states or territories with whose citizens defendant habitually transacted business and received applications and issued policies of insurance through and at its Kansas City branch office.

Its license only authorized it to do business in Missouri, and this fact made defendant, of its own volition and choice, subject to Missouri laws.

Comptroller Anderson testified that the New Mexico branch office was first opened in January, 1895 (Mary E. Head, Record p. 80), and the record shows that the only southwestern branch office maintained by the defendant in 1894 when these contracts of insurance were made was its said branch office at Kansas City, Mo. It thus appears that said Richard G. Head could only obtain these insurances from the defendant in the precise method in which this insurance was solicited and issued, at defendant's branch office at Kansas City, Missouri, and that at that time defendant was licensed to do business only in Missouri, and according to its laws. Said Richard G. Head, although a resident of New Mexico, did much business at Kansas City, Mo. He was in the live stock business, and his live stock business brought him to Kansas City, Mo., often. He also had considerable legal business which he transacted with Mr. Deatherage, as his attorney, at the law office of Mr. Deatherage in the New York Life Building, owned by the defendant, in Kansas City, Missouri, this being the same building in which defendant had its branch office, and while in said law office of Mr. Deatherage, said Richard G. Head was solicited by Mr. B. Magill, a soliciting agent of the defendant, to take these insurances. The testimony of Mr. Magill, who solicited and obtained from said Richard G. Head the insurance in these two cases, is contained in the record in these cases (Mary E. Head, Record pp. 16, 30, and Richard G. Head, Jr., Record p. 18).

The testimony of Mr. Magill shows that said Richard G. Head was a member of the Drumm-Flato Commission Company, doing business at the Stock Yards in Kansas City, Mo.; that said Richard G. Head was a stockholder in that company. Mr. Ma-

gill's testimony further shows that he solicited said Richard G. Head to take these insurances and received from said Head said application, in the law office of Mr. Deatherage, in the New York Life Building, in Kansas City, Mo., and that he turned over said application either to Mr. White or Mr. Lyon, who were the directing agent and cashier of the defendant company at its said branch office. Mr. Magill further testifies that he, at time of taking said application, took from said Richard G. Head his note for the premium on said two policies, amounting to \$850.00, payable in thirty days. The date of the application, which shows when the application was taken and when said 30 day note was given was March 24, 1894. The policies which were dated and issued on April 3, 1894, were sent by defendant to its said Kansas City branch office from New York.

The testimony of Mr. Magill further shows that upon the return of the two policies to the Kansas City branch office from the defendant at New York, the premiums were paid by said Richard G. Head and the policies delivered to him through his said attorney, Mr. Deatherage, and that those policies were delivered to Mr. Deatherage for Mr. Head in his said law office in the New York Life Building in Kansas City, Mo., and said premiums were paid by said Richard G. Head by giving a draft on said Drumm-Flato Commission Company, in Kansas City, Missouri, of which said Richard G. Head was a member and a stockholder.

It thus appears that the business and the transactions of the issue of these policies and the making of the contracts evidenced thereby, all took place in Kansas City, Jackson County, Missouri.

One of the contentions of defendant is that these insurances took effect from the time of the mailing of the policies by it from New York to its branch office at Kansas City, notwithstanding the policies were not to be and were not delivered or mailed to said Richard G. Head and notwithstanding they were not delivered until after they were received at and by the branch office in Kansas City, Missouri, and notwithstanding the fact that the premiums were not to be and were not paid by said Richard G. Head until the policies were delivered to him by defendant's agents at its branch office at Kansas City, Mo., after their receipt thereof from the company in New York.

Upon this point, we call attention to the following provisions of the policy, which are in the record in each case. At page 20

of the record in the Mary E. Head case appears the following provision in each policy :

"This contract is in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of four hundred and twenty-five dollars and cents, *to be paid in advance*, and of the payment of a like sum on the third day of April in every year thereafter during the continuance of this policy."

In each policy is also the following provision (Record p. 20) :

"If the insured is living on the third day of April in the year nineteen hundred and fourteen, on which date the accumulation period of this policy ends and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following :"

There appears also in each said policy the following provisions (Mary E. Head, Record pp. 21, 22) :

"Powers not delegated.

"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.

Payment of Premiums.

"All premiums are due and payable at the Home Office of the company unless otherwise agreed in writing but may be paid to agents producing receipts signed by president, vice-president, second vice-president, actuary or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall become the property of the company.

Grace.

"After this policy shall have been in force three months, a grace of one month shall be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium

remains due and unpaid. During the said month of grace, the unpaid premium, with interest as above remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of insurance."

At page 26 of the Mary E. Head record, there appears in the concluding portions of said Richard G. Head's application for these insurances, which is copied into each policy among the matters agreed to by them, the following:

4. *"That any policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of the premium by said company of its authorized agent, during my lifetime and good health."*

This provision, as already stated, was in said Richard G. Head's application for the insurance, dated March 24, 1894, and although he gave a note to the soliciting agent personally for the premiums of the two policies, the giving of that note was not a payment of the premiums and the premiums were not paid until the return before the end of the thirty days for which the note was given of the policies, and when the policies were delivered to said Richard G. Head and he paid said premiums by taking up said note and paying the premiums, then the application and policies became binding contracts thus entered into and executed in the State of Missouri (Mary E. Head, Record p. 16).

Another contention of defendant in the cases is that, after the payment of the premiums on these policies for more than ten years, the insurances for \$10,000 each on the two policies became lost by loan contracts entered into with it. The premium on each policy was \$425 annually. The first premiums were paid on the delivery of the policies in April, 1894, and it is a conceded fact in the cases that the premiums were paid in April of each year thereafter down to and including April, 1904, so that there were eleven annual premiums of \$425.00 on each policy paid by said Richard G. Head to defendant. In other words, there were total premiums amounting to \$4,675.00 paid on each policy, or \$9,350.00 altogether paid, and the correspondence between said Richard G. Head and defendant (Mary E. Head, Record p. 121) put in evidence by defendant, shows that said Richard G. Head had on these and other insurances paid \$15,000.00 of premiums up to that time, to defendant. As before stated, the application for insurance by said Richard G. Head for these policies

showed that said Richard G. Head was carrying \$30,000 other insurance with defendant. Notwithstanding the payment on these two policies of the above sum of \$9,350.00 as premiums thereon, and notwithstanding said Richard G. Head was rapidly becoming an old man, and notwithstanding the insurances covered by said policies were worth in 1904 much more than said sum of \$9,350.00 which had been paid as premiums thereon, defendant seems to be of opinion that it obtained a cancellation of these two \$10,000 policies by obtaining contracts of loan with said Richard G. Head on said policies for \$2,270.00 on each policy, or \$4,540.00. The policy loan agreement relied on by defendant in the Mary E. Head case may be found at page 40 of the record in that case, and in Richard G. Head, Jr., case the policy loan agreement may be found at page 16 of the record in that case. Those policy loan agreements were made in June and July, 1904. *At the time of the making of those loan contracts in June and July, 1904, defendant had no branch office in New Mexico.* See evidence of Comptroller Anderson. (Mary E. Head Record p. 77). *The right to make and receive these loans was conferred in and by the policy itself in each case* (See Mary E. Head Record p. 21; Richard G. Head, Jr., Record p. 23).

Those provisions in the policy which stipulate for loans, read as follows:

"Advances Within Accumulation Period.

"The company will make advances as loans upon this policy at the fifth or any subsequent anniversary of the insurance within the accumulated period, under the following conditions:

"First: That premiums are paid in full to the time when the loan is made, including the premium for the entire insurance year then beginning.

"Second: That the aggregate amount of loans outstanding from the sixth to the tenth years, inclusive, shall not exceed \$1100; from the eleventh to the fifteenth years, inclusive, shall not exceed \$2270; and from the sixteenth to the twentieth years, inclusive, shall not exceed \$3470.

"Third: That the policy shall be duly assigned to the company as collateral security for the loans, and deposited at the Home Office.

"Fourth: That interest at the rate of five per cent per annum shall be paid upon all such loans at the anniversary of the insurance next succeeding, and annually thereafter until the loans are paid off.

Fifth: That the loans shall be for such time as the borrower may elect, not longer, however, than to the end of the Accumulated Period.

"Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder."

These loans for \$2,270.00 on each policy were made for those sums pursuant to the second paragraph of said loan provisions of the policy which provided that from the eleventh to the fifteenth year of the policy the holder thereof might borrow not exceeding \$2,270.

It will be observed that said loan provisions of the policy do not contain any provision that said loan should be taken into account in determining the question of the amount of extended insurance, as contended for by defendant in its answer (Mary E. Head, Record p. 9), under Section 88 of Chapter 690 of the laws of 1892 of the State of New York pleaded therein.

Notwithstanding the foregoing provisions in regard to loans contained in the policies of insurance, defendant claims that the loan contracts entered into in 1904 were independent contracts standing by themselves, separate and apart from the contracts of the policies, and defendant makes this claim notwithstanding the contrary and opposing explicit decision in the case of *Burridge v. New York Life Insurance Co.*, 211 Mo. 158, l. c. 174-178, and other Missouri Supreme Court decisions.

Indeed the Cravens, Smith and Horton cases, *supra*, decided by the Missouri Supreme, and by this court, were all adjudged before the making of those loan contracts, and the Burridge case, followed the Cravens, Smith and Horton cases, holding in conformity therewith as being the settled law of Missouri; that loan contracts where made as in these cases pursuant to stipulations and provisions therefor contained in the policies, cannot change or convert Missouri contracts governable by the foregoing sections of our insurance laws, into New York contracts. Plaintiffs in these cases contend that the Missouri insurance laws, *supra*, and the above decisions in the Cravens, Horton and Smith cases make as strong a case of vested right in plaintiffs, and for the application of the maxim of *stare decisis* as could be found or considered.

Said loans were made within two years before the death of the said Richard G. Head. The record shows that plaintiffs first ob-

tained loans of \$1100.00 on each policy in 1899. At that time all premiums to that date had been paid and no part of those loans were for any premiums on the policies. (Letter of S. B. Wood, Cashier, of defendant's office at Kansas City, of May 20, 1899. Mary E. Head, Record p. 63, Richard G. Head, Jr., Record pp. 42-43).

In 1904, the insured became entitled under the terms of the policies to loans, not exceeding in the aggregate \$2270.00 on each policy, including the \$1100.00 previously loaned in 1899 (Mary E. Head, Record p. 21, Richard G. Head, Jr., Record pp. 23-24). Thereupon application was made for a loan of \$2270.00 on each policy and the loans for that amount were made, and were applied as shown by the letter of M. Kellogg, cashier of the appellant's branch office, of July 29, 1904, as follows, on each policy:

Outstanding loan,	\$1100.00
April, 1904, annual premium	425.00
April annual premium, grace interest,	6.55
Interest in advance to April 3, 1905,	95.35
Premium lien note,	310.00
Interest on premium note,	4.80
	<hr/>
Leaving amount paid in cash out of loan	1941.70
	328.30
	<hr/>
Making the amount of loan,	\$2270.00
(Mary E. Head Record, pp. 105 to 129, Richard G. Head, Jr., Record, pp. 71 to 96). It thus appears conclusively that no part of the loans of \$2270.00 on each policy was for premiums except April premium for 1904 of	
Interest thereon,	\$425.00
Premium lien note,	6.55
Interest thereon	310.00
	4.80
	<hr/>
Making,	\$746.35

But for good measure at the trial, plaintiffs also included the item of \$95.35, interest, in advance to April 3, 1905, making a total of \$841.70 that might be considered as a part of premium indebtedness to be deducted from the net value of the policies when default occurred in paying the premiums for 1905. The record shows that after deducting the sum of \$841.70 owing on account of premiums for three-fourths of the net value of the policies, there remained a net value of over \$800.00, which applied as a single premium at the age of Mr. Head for temporary extended

insurance for the full amount of the policy, according to the Missouri Statutes of 1889, would continue the insurance in force for a period of three and one-half to four years, and long after the period of Mr. Head's death, which was on April 8, 1906. (Mary E. Head, Record, pp. 55-31-33; Richard G. Head, Jr., Record, pp. 45-49-51).

The burden of establishing that the loans were for unpaid premiums was upon the defendant, but there is no dispute as to the actual amount of such loans used for premiums, which has heretofore been stated.

One of the contentions of defendant is that in the Mary E. Head case she lost her insurance because, in May, 1905, she demanded a paid-up-policy. (Mary E. Head Record, p. 41.) That request reads as follows:

"May 3, 1905.

"The New York Life Insurance Company is hereby requested to endorse policy No. 599690 for \$599690 this being the amount of paid-up insurance payable in accordance with the terms of the policy.

Richard G. Head, Insured.

Mary E. Head, Beneficiary Assignee.

Wm. G. Haydon, Witness."

It appears that after the sending of that request to defendant, it made the endorsement on the policy held by said Mary E. Head that she was entitled to \$89. The uncontradicted evidence is that that sum has never been paid to or received by the plaintiff in that case and that she has steadfastly refused to receive the same, she being unwilling to cancel an indebtedness for which her judgment in this case was given for about \$7,500.00, on the payment of \$89. At the time of the request and on April 3, 1905, a month prior to the making of that request, the evidence in the case shows that the net value of Mary E. Head's policy was \$2,284.50 and that was the amount, according to the Missouri statutes which govern the case, that was applicable as a single premium for extended insurance. And the evidence of the experts in the case, J. B. Reynolds and F. B. Mead, show that that amount was sufficient to purchase extended insurance for the full amount of the policy, viz., \$10,000.00, three or four years after April, 1905.

It is admitted that said Richard G. Head died in April, 1906. (Mary E. Head Record, p. 8.) The evidence of said experts showing the above facts may be found in the Mary E. Head Record, pp. 31-42-101-64).

The testimony shows that if a paid-up policy had been issued by the defendant, in accordance with the Missouri Statute, it should have issued for about \$3,000 instead of \$89.

The exact amount of a paid-up policy that the company should have issued appears from the testimony of Mr. Reynolds at page 44 of the Mary E. Head Record, as follows:

"A. It would purchase a paid-up-policy at the published rates of the company used at that time of \$2873.08."

When said plaintiff, Mary E. Head, made said application for a paid-up policy, she had no knowledge of the value of the policy. This appears from her evidence at page 58 of the record in her case, which as as follows:

"Re-Direct Examination by Mr. Deatherage.

"Q. How old is your brother Richard G. Head?

A. 16 years old the 16th of last November.

Q. November, 1907?

A. Yes, sir.

Q. At the time that you made the application introduced in evidence for a paid-up policy, did you know what was the value of that policy which has been introduced in evidence?

A. I did not.

Q. Did you know anything as to its cash value?

A. No, sir.

Q. Had you any knowledge as to how much paid-up insurance you were entitled to?

A. Not in the least.

Q. Did you learn at any time prior to the death of your father what was the value, the cash value of that policy or the amount of paid-up insurance to which you were entitled.

Mr. Pratt: Objected to by the defendant as incompetent, irrelevant, and moreover the fact has appeared here that this witness received back this policy with amount of paid-up insurance, and it is calling for immaterial testimony.

By the Court: Objection overruled; defendant then and there duly excepting.

Q. (Question read to witness):

A. No, I did not.

Q. Then when you made application for the policy, paid-up policy, did I understand you, that you had no knowledge as to what its actual value was or what amount of paid-up policy of insurance you were entitled to?

Mr. Pratt: Objected to by the defendant as incompetent, irrelevant and calling for immaterial testimony.

By the Court: Objection overruled; defendant then and there duly excepting.

A. No, sir.

Q. And you had no such knowledge until after your father's death?

Mr. Pratt: Objected to by the defendant as incompetent, irrelevant and calling for immaterial testimony.

By the Court: Objection overruled; defendant then and there duly excepting.

A. No, sir.

Q. Why did your father not pay the premiums due on this policy in April, 1905?

Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: If she knows why he did not pay it.

Defendant then and there duly excepting.

Q. (by Mr. Deatherage) Why didn't he pay it?

A. He did not have anything to pay it with.

Q. On account of his financial condition?

A. Yes, sir."

Under the provisions of the last half of said Section 5857 of the Mo. Rev. Stat. 1889, relative to paid up policies, the amount of the paid up policy in this case would be for eleven-twentieths of the face of the policy or \$5500, there having been eleven of the twenty annual premiums paid.

This point which arose in the Mary E. Head case, to the effect that she lost her insurance by the endorsement of said amount of \$89 thereon, does not arise in the Richard G. Head, Jr., case.

BRIEF OF THE ARGUMENT.

I.

The defendant, although a foreign corporation created and existing under the laws of the State of New York, came into Missouri under its license and permission, and made the contracts of insurance sued upon in these actions, in the State of Missouri, with the same force and effect and subject to the insurance laws of Missouri the same as if it had been and were a corporation created under the laws of Missouri instead of the laws of New York, and for the purposes of this case defendant must be taken to be the same in all respects as a Missouri corporation.

Our corporation laws in force when defendant obtained its license to do business in Missouri provides that every foreign corporation doing business in that state shall have and maintain a public office therein for the transaction of its business, and said section contains specifically the following language:

"And such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

Missouri Session Laws 1891 page 75, Sec. I.

II.

The contracts in these cases having been entered into in Missouri, have the same legal effect and force as if said Richard G. Head had lived in Missouri, in which state he was born, instead of living in New Mexico, at the time of making these contracts. The people of all the states and territories of the United States have the right to buy and sell real estate in Missouri, own property therein and enter into contracts therein, the same as citizens and residents of Missouri.

By Section 748 of the Statutes of Missouri, regarding aliens, Vol. 1, Revised Statutes of Missouri of 1909, p. 355, even aliens may acquire real estate in that state, the same as if they were citizens of the United States and residents of that state.

Section I, Article XIV of Amendments to the Constitution of the United States, provides as follows:

ARTICLE XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under this paragraph of the Federal Constitution, said Richard G. Head and the plaintiffs in these actions claiming under him have the same contract rights under these policies of insurance, obtained and issued in the State of Missouri, that they would have if Mr. Head and his family had lived in Missouri, where he was born, instead of living in the Territory of New Mexico. There is nothing either in the legislative or judicial history of Missouri that warrants counsel to make any claim to the contrary. There is nothing in the judicial utterances either of the Supreme Court of Missouri or of any of its courts of appeals which hold that property rights as to real or personal property in Missouri, or contract rights, were or are any different where those property or contract rights are owned or claimed by a non-resident of Missouri than if he were a resident of that state. The imputation of defendant's counsel is a calumny on Missouri and on her legislative and judicial history. Defendant's counsel practically admit that if said Richard G. Head had resided in Missouri when these contracts were made in April, 1894, the insurance company would be without any defense, and the only claim of counsel seems to be the proposition that a recovery cannot be had on these policies, because said Richard G. Head did not live in Missouri at the time of these transactions. Since said Richard G. Head was not a corporation he had the absolute right to do business, acquire property and acquire vested rights under contracts made pursuant to Missouri laws, all in the State of Missouri, the same as could be acquired by the citizens of Missouri. Instead of living in Missouri where he was born and running his ranch from his home in Missouri he chose to live on his ranch.

Under said 14th Amendment Mr. Head and these plaintiff children were guaranteed the same right as if they had lived in Missouri.

Yick Wo v. Hopkins, 118 U. S. 356-369.

R. W. Co. v. Mackey, 127 U. S. 205, 1. c. 209.

Duncan v. Missouri, 152 U. S. 377.

Frazer v. McConway Co., 82 Fed. 257.

Templar v. Bankers Board Ex., 131 Mich. 254.

Steed v. Hamcy, 18 Utah, 367.

Pearson et ux. v. City of Portland, 69 Maine, 278.

III.

The question of the situs of contracts in cases where the question of their validity depends upon the laws of the state where they are made does not depend upon the residence of the parties. If two citizens of Iowa and Illinois come into Missouri and buy a parcel of real estate or personal property situate in Missouri or make any other contract in Missouri, the contract rights of the parties are governed by the laws of Missouri, the same as if either or both lived in Missouri. This question was decided in an insurance case by the Supreme Court of New York. We refer to the case of *Napier v. Bankers Life Insurance Co. of the City of New York*, 100 N. Y. Supp., 1072. In that case the point we contend for was adjudged as follows:

"Where a policy of life insurance was signed and delivered in the City of New York, and provided for the payment of premiums to the company and the amount of the policy by the company to be made in that city, at the Home Office, after receipt of satisfactory proofs of death, it is a New York contract, though the insured resided in another state."

The insurance company in that case was a New York company. The company in the case relied upon the New York statute as a defense. The assured in that case was a citizen of Chicago, Ill. The question in the case was whether the New York statute relied upon by the insurance company as a defense in the case governed the case, the insured having been a citizen of Chicago, Ill. The court held, as already appears, that the contract was a New York contract, although the assured lived in Illinois. And in the opinion in the case, disposing of the point and holding that it was a New York contract, the court uses the following language:

"The policy was issued upon the life of a man residing at the date of the issuing thereof, in the City of Chicago, in the State of Illinois; and, so far as the evidence in this case shows, that continued to be his residence up to the date of his death. If this policy is to be construed as an Illinois contract, the statute above referred to would not apply. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; *Mutual Life Ins. Co. of New York v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. Notwithstanding the fact that the policy was written upon the life of a person residing out of the State of New York, I am of the opinion that, upon the evidence in this case, the contract must be deemed to be a New York contract. The policy purports to be signed and delivered at the City of New York."

The following cases illustrate that the courts do not consider the residence of the parties as having any influence in determining the place where a contract is made.

- Milliken v. Pratt*, 125 Mass. 374.
- Golden v. Ekerb*, 52 Mo. 260.
- Richardson v. DeGinesville*, 107 Mo. 422.
- Ruhe v. Byck*, 124 Mo. 178.
- Reed v. Telegraph Co.*, 135 Mo. 661.
- Horton v. New York Life Ins. Co.*, 151 Mo. 604.
- Elliott v. Des Moines Life Ass.*, 163 Mo. 132.
- Thompson v. Traders Ins. Co.*, 169 Mo. 12.
- Park v. Conn. Fire Ins. Co.*, 26 Mo. App. 511.
- Clothing Co. v. Sharpe*, 83 Mo. App. 385.
- Pietri v. Seguenot, Admr.*, 96 Mo. 258.

IV.

The contention of defendant's counsel that its offer to pay \$89.00 to satisfy a liquidated indebtedness for which the judgment was given for about \$7500.00 and that that offer of \$89.00 extinguishes plaintiff's liquidated demands, is not supported by anything in the law.

1 Cyc. Law & Proc., 319.

The author of the article on "Accord and Satisfaction" in that authority, thus correctly states the rule on this subject:

"V. METHODS OF ACCORD AND SATISFACTION.

"A. Part Payment. 1. *Liquidated Debt*. a. *Necessity of New Consideration*. (1) *Statement of General Rule*. Where the debt or demand is liquidated or certain and is due,

payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of a less amount than is due operates only as a discharge of the amount paid, leaving the balance still due, and the creditor may sue therefor notwithstanding the agreement."

Very many authorities from all of the states and from the Federal Courts and the courts of England and Canada are cited by the author in support of the above proposition. Among the many authorities thus cited is the case of *Wetmore v. Crouch*, 150 Mo. 671-672-682-683. The proposition adjudged in that case on this point, as appears from point 6 of the syllabus therein, is thus stated:

"6. Accord and Satisfaction. The payment of a smaller sum than is unquestionably due, and which has no other element of accord in it than mere payment, is not a satisfaction of the debt even though accepted as such at the time."

At p. 683 the court in its opinion said:

"A transaction which consists only in the payment of a smaller sum than is unquestionably due, and which has no other element of accord in it, is not a satisfaction of the debt even though accepted as such at the time. *Riley v. Kershaw*, 52 Mo. 224; *Swafford Bros. D. G. Co. v. Goss*, 65 Mo. App. 55."

The testimony of the plaintiff, Mary E. Head, shows that she had no knowledge of the value of the policy at the time of the tender of \$89.00 made by appellant and that she never knew what she was entitled to until after the death of her father. Furthermore she never agreed to take said \$89.00 in satisfaction of \$7500.00 or thereabouts that was due her on the death of her father for which her judgment herein was given and never did accept or receive \$89.00 or any other sum in settlement of the policy. This point does not arise in the *Richard G. Head, Jr.* case.

V.

The claim in the *Mary E. Head* case that the endorsement of said \$89.00 by appellant on said *Mary E. Head* policy was the same as a paid-up policy issued under Section 5857 of the Revised Statutes of Missouri of 1889, cannot be sustained. Said \$89.00 was not

the amount due as a paid-up policy on said Mary E. Head policy by virtue of said Section 5857 of the Missouri Revised Statutes, but said \$89.00 under the evidence adduced by defendant was the amount claimed by it to be the entire amount due as a paid-up policy under the laws of New York. There was no new policy issued by defendant under Section 5857 of the Revised Statutes of Missouri. Defendant cannot claim under both the statutes of New York and Missouri. Its claim that \$89.00 satisfied the Mary E. Head policy demand is made under the laws of New York. If the policy was a Missouri contract, then it is governable by the law of Section 5857 copied in our foregoing statement. That section provides how a paid-up policy in cases like this may be issued, but that section was not followed by defendant. Defendant can hardly claim that it followed the Missouri statute above cited, with respect to the form of the transaction in issuing a paid-up policy, but that it followed the New York statute in ascertaining the important part of the amount due on a paid-up policy. The case of *Cravens v. Ins. Co.*, 148 Mo. 583, is decisive of the point that defendant did not comply with the above Missouri statute in regard to the issuance of said paid-up policies in these cases.

The above case of *Cravens* was affirmed by this court. *Ins. Co. v. Cravens*, 178 U. S. 389. This point does not arise in the Richard G. Head No. 255 case.

VI.

The proposition that these policies were and are Missouri contracts are amply supported by the following authorities:

Cravens v. Insurance Co., 148 Mo. 583.

Ins. Co. v. Cravens, 178 U. S. 389.

Equitable Life v. Clements, 140 U. S. 226.

Whitfield v. Ins. Co., 205 U. S. 489.

Moore v. Ins. Co., 112 Mo. App. 696.

Ins. Co. v. Russell, 77 Fed. Rep. 94, 23 C. C. A. 43.

Ins. Co. v. Twayman, 92 S. W. 335.

Capp v. Ins. Co., 94 S. W. 734.

Horton v. Ins. Co., 151 Mo. 604.

Joyce on Ins., Sec. 194.

Napier v. Ins. Co., 100 N. Y. Supp. 1072.

Burridge v. Ins. Co., 211 Mo. 158-178.

VII.

Equally erroneous is defendants' proposition that the loan contracts of 1904 had the effect of wiping out the policies.

Smith v. Insurance Co., 173 Mo. 329, 1. c. 341-342-343.

Burridge v. N. Y. Life Ins. Co., 211 Mo. 158, 1. c. 178;
109 S. W. Rep. 560.

Cristensen v. N. Y. Life Ins. Co., 152 M. A. 551; 134 S. W. 100.

These authorities are conclusive of the proposition that the act of the Missouri Legislature of 1903 authorizing such loan contracts as were made in these cases, does not apply to these cases, because that act only operates prospectively and not retroactively or retrospectively. That act only applies to policies issued thereafter, that is, after 1903.

VIII.

In these cases, the policies having contained provisions and stipulations for the making of loans and loan contract, these loans and loan contracts made in 1904 cannot be considered as separate loans and loan contracts. This was explicitly decided in the case of *Burridge v. N. Y. Life Insurance Co.*, 211 Mo. 158. See also to the same effect, *Christensen v. N. Y. Life Ins. Co.*, 152 Mo. App. 551. This latter case was the same as the case of *Burridge v. N. Y. Life Ins. Co.*, *supra*, and the same ruling was made by the court in that case.

The policies in these cases, having been issued in Missouri and having been at the time of their issue in 1894 Missouri contracts, and the loan contracts of 1904 having been made pursuant to and in execution of the loan provisions and stipulations of the policies, the rights of the parties respecting said loan contracts were not different from what their rights were as fixed by the policies themselves when they were issued containing the provisions for said loan contracts. And both of the cases of *Burridge* and *Christensen*, were decided upon the basis that the loan contracts in cases of this kind where there are provisions and stipulations in the policies for the loans, must be held as governable by the law in force at the time of the issuance of the policies.

IX.

The point that these policies must be taken to have been delivered when they were mailed from New York, cannot be sustained. The decision in the case of *Horton v. N. Y. Life Ins. Co.*, 151 Mo. 604, is precisely in point. That case is exactly parallel with these. In that case the court, in an elaborate opinion delivered by Judge Valliant, held that the policy in that case, although mailed from New York did not by such mailing become a contract, because it was not mailed to the policy holder, but was mailed to the branch office of defendant for delivery by defendant's branch office to the policy holder upon the payment of the premium. The remarks of the court in its opinion upon this point commence at page 619.

X.

Respecting the suggestion and argument of counsel that defendant had the right to come into Missouri and make contracts in defiance of law, we submit that the right of contract is not an unlimited, unqualified one, but is always subject to the law in force at the time of making the contract.

Wilson v. Drumrite, 21 Mo. 325.

Villa v. Bodrigues, 12 Wall. 339.

State ex rel. v. Fireman's Fund Ins. Co., 152 Mo. 1.

State v. Cantwell, 179 Mo. 245.

Holden v. Hardy, 169 U. S. 366.

Karness v. Insurance Co., 144 Mo. 413.

Havens v. Insurance Co., 123 Mo. 403.

Henry v. Evans, 97 Mo. 47.

These decisions all proceed upon the theory that where the relation of mortgagor and mortgagee, pledgor and pledgee, insurance company and insured, or other like fiduciary relations subsist between the parties, legislation forbidding or governing the subject of contracts is permissible and sustainable. The relation between an insurance company and a policy holder is certainly fiduciary in its character, and is one that courts have more than once decided to call for the protection of the Legislature by such wholesome legislation as lies at the foundation of these actions. That principle was recognized and solemnly adjudged in the case of *Smith v. Mutual Benefit Life Ins. Co.*, 173 Mo. 329, in the *Cravens* cases, and also by *Mutual Life Ins. Co. v. Twyman*, 92 S. W. Rep. 335, which was decided by the Kentucky Court of Appeals. This same principle was recognized by the decision of the United States Circuit Court of

Appeals of the Sixth Circuit, in the case of *Narramore v. Ry. Co.*, 96 Fed. Rep. 298; 37 C. C. A. 499. In that case there was a statutory provision for bidding unblocked switches in railway yards. The plaintiff was injured because of such unblocked switches. The case was from Ohio. It was contended by the railway company that the plaintiff servant had assumed the risk of the absence of the unblocked switch which the statute required. The trial court gave judgment for the railway company, but this judgment was reversed in the court of appeals. The court of appeals held that the doctrine of assumption of risk rests upon contract, and that the servant and the railway company, by reason of the relation of the parties, could not contract away the obligation and positive duty of the railway company to furnish a blocked switch, as the statute required.

In the opinion in the case, the United States Circuit Court of Appeals used the following language:

"If, then, the doctrine of assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute."

The court recognized this principle as applicable to insurance contracts in the case of *Andrus v. Fidelity Mutual Life Ins. Association*, 168 Mo. 151. Thus in point 4 of the syllabus it was adjudged as follows:

"Owing to the nature of insurance companies and the character of their contracts, they naturally and properly belong to a class unto themselves and must be governed by laws that would be wholly inappropriate to any other company or to any other contracts."

See also *Ins. Co. v. Daggs*, 172 U. S. 557, 562.

ARGUMENT.

I.

The application for insurances in these cases having been made and delivered by the assured to the defendant at its agency in Kansas City, Missouri, and the policies sued on having been delivered to the assured by defendant's agent in said Kansas City, Missouri, and the first premium having been paid to defendant's agent in Kansas City, Missouri, and all of the business resulting in the final completion of the contracts of insurance having taken place in Kansas City, Missouri, it results that, under the decisions of the Missouri Supreme and Appellate Courts, and under those of the Supreme Court of the United States, the contracts in suit must be taken as Missouri contracts and not contracts governable by the laws of New York.

Cravens v. Insurance Co., 148 Mo. 583.

Insurance Co. v. Cravens, 178 U. S. 389.

Equitable Life v. Clements, 140 U. S. 226.

Whitfield v. Insurance Co., 205 U. S. 489.

Smith v. Mutual Benefit Life Insurance Co., 173 Mo. 329.

Moore v. Insurance Co., 112 Mo. App. 696.

Insurance Co. v. Russell, 77 Fed. Rep. 94; 23 C. C. A. 43.

Insurance Co. v. Twyman, 92 S. W. 335.

Capp v. Insurance Co., 94 S. W. 734.

Horton v. Ins. Co., 151 Mo. 604.

Joyce on Ins. Sec. 194.

Napier v. Ins. Co., 100 N. Y. Supp. 1072.

Burridge v. Ins. Co., 211 Mo. 158-178.

It is contended that a different rule arises in these cases as to whether the contract is a Missouri contract or not, from the fact that Mr. Head was not a citizen of Missouri, but a citizen of New Mexico.

We do not think that makes any difference in the case. If the decisions and authorities on the subject of conflict of laws growing out of the question whether a given contract is a contract of one state or another state, are consulted, it will be found that the question of residence or citizenship of the parties is not an element determining or controlling the decisions.

In these cases, the defendant insurance company was a corporation and a citizen of the State of New York, and we suppose that the question whether this contract is a Missouri contract is not affected by the consideration that the Insurance Company was or was not a corporation and citizen of New York. If a citizen of Missouri goes to the State of Iowa to buy a parcel of real estate owned by a citizen of Illinois, we suppose that the contract resulting in the sale of that land, is an Iowa contract governable by the laws of that state. The state and place where the transaction occurs usually determines the *lex loci contractus*, as it is called in the books. The law of the place where the contract is made governs, in the determination of its validity and its construction, and enters into and becomes a part of the contract. *Scudder v. Bank*, 91 U. S. 406.

If a citizen of Topeka, Kansas, were to write to a citizen of Kansas City, Missouri, or St. Louis, Missouri, to have ten gallons of gin or other liquors shipped from Missouri to Kansas, and those liquors were shipped, the decisions of the Kansas Supreme Court, which are in harmony with the general current of authority, hold that that is a Missouri contract governable by the laws of Missouri. Why? Not because a citizen of Topeka does or does not live in Kansas, or does or does not live in Missouri, but because the transaction is consummated when the liquor is shipped and put on the cars in Missouri for shipment to Kansas. That is the crowning act which makes the negotiations of the parties a contract. The crowning act in the cases at bar was the delivery of the policies, pursuant to Mr. Head's application, to him in Kansas City, Missouri, and the payment at that place of the first premiums.

In this connection, it will be noted that the policies sued on were not mailed from New York to Mr. Head, but were sent by the company to its agent in Kansas City, to be by its agent delivered to Mr. Head, the assured, in Kansas City, Jackson County, Missouri, where they were delivered to him. Of course until each policy was delivered in Kansas City, Jackson County, Missouri, by defendant's agent, it was still under the control of the defendant and was in no way a completed, consummated binding contract. When it was delivered it became such a contract.

Horton v. Ins. Co., 151 Mo. 604.

A great number of cases might be cited to the court on this branch of the case. Counsel on the other side do not cite any

case holding that the residence or citizenship of the parties to the contract furnish a test by which to determine where the contract was made or what law should govern it. The law of the state where the contract was made governs, and if that law makes the contract valid, the contract is valid. If, on the other hand, that law renders the contract void, or certain provisions of the contract void, then that contract is accordingly void, and it will not be enforced in the courts of another state, even though the laws of the latter state may not render the contract invalid. In other words the contract will or will not be enforced accordingly as it is valid or invalid, by the laws of the state in which it was made, regardless of the residence of the parties.

An instructive opinion was delivered by Chief Justice Gray of the Massachusetts Supreme Court, (afterwards one of the Justices of this Court), in the case of *Milliken v. Pratt*, 125 Mass. 374. We do not cite this case because it is special in its character, but it is one of a great number of cases that might be cited upon the point that the validity of contracts in this class of cases must be determined by the law of the place where the contract was made, irrespective of the residence or citizenship of the parties.

In that case, it was held that the validity of a contract, even as regards the capacity of the parties, is generally to be determined by the law of the state in which it was made. In that case, an inhabitant of Massachusetts bought goods in Portland, Maine. The goods were ordered by letter mailed in Massachusetts and they were delivered to a carrier in Maine for the citizen in Massachusetts who made the order. The question as in a number of other cases, was whether the contract was a Maine or Massachusetts contract. The court, by Chief Justice Gray, held that it was a Maine contract governable by the law of that state, notwithstanding the residence of one of the parties in Massachusetts.

II.

We desire to call attention to some of the cases in support of the proposition that the phrase *lex loci contractus*, or in other words the question of the place of making a contract and the place of the laws which govern the construction, interpretation and validity of a contract, do not involve the consideration of the residence of the parties; and that the fact that the policies in these cases were *lex loci contractus* in the State of Missouri, is the same as if Mr. Head had resided in Missouri instead of New Mexico.

The case of *Depas v. Mayo*, 11 Mo., 314, recognizes the rule which everywhere prevails, that as regards real estate contracts, the law of the place where the land is situated governs.

In the opinion in that case, Judge Napton, speaking for the court, says:

"The removal of Depas and his wife from Louisiana to this state does not alter the character of this transaction. Had Depas, while residing in Louisiana, remitted a sum of money belonging to the community and procured its investment in Missouri lands, would the rights of the parties in Louisiana have been changed. What difference can it make that, previous to the investment the parties had changed their domicile? The bill assumes that the purchase of lots in St. Louis was not an acquisition here, but a mere investment of money previously acquired in Louisiana.

In the case of *Houghtaling v. Ball*, 19 Mo. 84, the court held as follows:

"The fact that wheat contracted to be sold and delivered in Illinois is to be held up on its arrival in Missouri, will not subject the contract to the operation of our statute of frauds."

In that case, the contract for the sale of the wheat was made and the wheat was delivered at Chicago, Ill. The sale and delivery was to the defendants through their agent at Chicago. The wheat was shipped to the defendants at St. Louis. The court held that the laws of Illinois, where the contract and delivery were made, alone operated on the agreement, and it was not considered that the residence of the parties had anything to do in determining the question of *lex loci contractus*.

See also the same case, in *Houghtaling v. Ball*, 20 Mo. 563. There is a statement of facts in this latter report of the case from which it appears, inferentially at least, that the plaintiff did business at Chicago and the defendants at St. Louis. It was held by the court that the statute of frauds of Illinois, and not the statute of Missouri, governed the case, and the fact that one of the parties resided in Illinois and the other in Missouri, was not considered by the court as having any influence in determining the question of *lex loci contractus*.

The case of *Golson v. Ebert*, 52 Mo. 260, is to the same effect. That case originated in the St. Louis Circuit Court. The plaintiffs were partners doing business in New Orleans, La. The defendants

did business and resided in St. Louis. The defendants, by their agent in New Orleans bought certain merchandise from plaintiff. The goods were to be and were delivered in New Orleans to and through the agent of defendants. The court held that the contract was governable by the laws of Louisiana, where the contract was made and fulfilled, and not by the laws of Missouri, where the suit was brought and defendants resided (See p. 272). And the fact in that case, that one of the parties to the suit resided in Louisiana and the other in Missouri, was not mentioned or considered by the court as having any influence upon the question of *lex loci contractus*.

In the case of *Schell v. Inc. Asso.*, 150 Mo. 103, the court held the following:

"The statutes of this state governing building and loan associations form a part of the contracts between the association and its borrowing members, and should be so read into the contract as to prevail over their language if such language is in conflict therewith."

The contract in that case was with reference to a loan made by deeds of trust on real estate in Springfield, Mo., but it was not considered as having any influence upon the question in the case, where the parties in the case or either of them resided.

See also *Johnston v. Gawtry*, 11 Mo. App. 322, l. c. 331-332.

In the opinion given by the St. Louis Court of Appeals in that case, the court, at pp. 329-330, says:

"We are of opinion that upon the pleadings and evidence, plaintiff was entitled to the decree. The note was perhaps signed by Mrs. Gawtry in New Jersey, and she probably resided there at the time. The general rule, however, is that the place where a contract is made, depends, not upon the place where it is written, but in the place where it is delivered as consummating the bargain. There is no doubt that the place of the contract therefore was New York."

In the case of *Parks v. Conn. Ins. Co.*, 26 Mo. App. 512, the St. Louis Court of Appeals adjudged as follows:

"The local laws of a state form a part of contracts entered into in such state, which contracts are subject to provisions of such laws rendering void certain clauses, if contained in such contracts."

That was a suit in a Missouri court by a citizen of Texas, against the insurance company, which was a Connecticut corporation. It was a case of a fire policy on property in Texas. The contract in the case was treated and held by the court as a Texas contract. The question of the citizenship of the parties in Texas and Connecticut was not considered or held by the court as having any influence upon the question of *lex loci contractus*.

In the case of *Phoenix Mutual Life Ins. Co. v. Simons*, 52 Mo. App. 357, the Kansas City Court of Appeals adjudged the following propositions:

"The validity of a contract—whether as to the form or manner of its execution, or as to the capacity of parties—should be determined by the law of the state where the same is entered into, and, if valid there, it is valid elsewhere; and this rule alike governs the disabilities of coverture, infancy, etc.

"A note made by a married woman, dated in Kansas, executed in Missouri, was sent to and delivered in Kansas. *Held*, a Kansas contract, as it was the delivery that completed the contract and gave it life; and it, therefore, bound the maker according to the laws of Kansas, which would be enforced in the Missouri courts."

The insurance company in that case was a Connecticut corporation, with its principal place of business at Hartford, Conn. The agent of the insurance company was a concern at Ft. Scott, Kansas. The defendant and her husband lived at Nevada, Mo. The controversy between the parties seems to have been over a loan for \$1,200.00, made by the defendant through the Ft. Scott agency of the plaintiff Connecticut corporation. The defendant was a married woman, and the question in the case seems to have been whether her note was a Kansas or Missouri contract. The court seems to have held that it was a Kansas contract, but neither the residence in Connecticut of the insurance company or the residence of defendant in Missouri, were considered or held by the court as having any influence or significance upon the question of *lex loci contractus* in the case. In the opinion of the court the following language is used:

"Now, in our opinion the facts above stated show this note to have been made in Kansas and not in Missouri. The instrument is dated at Fort Scott, Kansas, was signed at Nevada, Missouri, but *delivered* to the plaintiff at Fort Scott, Kansas. It then became a completed contract at its *delivery*,

and not before. The mere signing of the paper did not make or locate the contract. It was the subsequent delivery that first gave it life. Until the instrument signed at Nevada, Missouri, had reached the plaintiff's agent at Fort Scott and was by them received and approved the contract was incomplete. Before that there was no perfected obligation because no delivery. The solicitor at Nevada had no authority to pass on the paper, he was a mere conduit or middle man through which the parties negotiated. He only took the note, after it was signed at Nevada, and passed it to the company at Fort Scott for their action. The delivery was only complete when these agents of the plaintiff in Kansas received it. It was these agents at Fort Scott who had authority from the plaintiff to close up the loan, and pay the money. They did receive the note sent to them from Nevada, Missouri, and then consented to and did pay over the money which they had been authorized to loan. The *lex loci contractus* was then fixed. It was at Fort Scott, Kansas, and not at Nevada, Missouri. The foregoing propositions are amply supported by eminent judges and text-writers. *Miliken v. Pratt*, 125 Mass. 375, and cases cited; *Hill v. Chase*, 143 Mass., 129; *Gay v. Rainey*, 89 Ill. 221, 225; *Butler v. Meyer*, 17 Ind. 77; *Bell v. Packard*, 69 Me. 105; *Lawrence v. Bassett*, 5 Allen, 140; *Baum v. Birchall*, 24 Atl. Rep. 620; *Thompson v. Ketcham*, 8 Johns (N. Y.) 190; *Greenevood v. Curtis*, 6 Mass. 377; *Scudder v. Bank*, 91 U. S. 406, 412; *Storey on Conflict of Laws* (8 Ed.), 842; *Stir v. Matthews*, 63 Mo. 373.

Judgment reversed and cause remanded. All concur."

So, in the case of *Hauck Clothing Co. v. Sharpe*, 83 M. A. 385, the court held as follows:

"It is the general rule that in conflict of laws, matters connected with the performance of a contract are regulated by the law of the place of performance. But the *lex loci contractus* generally governs as to the validity and the construction of the contract and the capacity of the parties to make it, unless made by special reference to the laws of the place of performance, or concerning real estate."

In the opinion in that case, the St. Louis Court of Appeals, by Judge Bland, used the following language:

"The evidence is that the common law of coverture is in force in Indiana. If the note is an Indiana contract, then it is void for want of legal capacity in Mrs. Sharpe to bind herself personally, by signing her name to the note. Under the laws of Missouri defendant had legal capacity to make the note. The learned circuit judge decided that the note was

an Indiana contract. How the law of Indiana, as to the legality of the note can be applied, it is difficult to see, in view of the fact that the note was made in Missouri, and the suit to enforce its collection was brought here. 'A contract is made when both parties agree to it. If the offer is made by letter, then it is made where the party receiving the proposition puts into the mail his answer accepting it, or does any equivalent act,' says Prof. Parsons (2 Parsons on Contracts, p. 582); *Glass Company v. Taylor et al.*, 34 S. W. Rep. loc. cit. 712. When in answer to W. W. Sharpe's request the defendant signed the note and put it in the mail at Pike County, Missouri, addressed to her son, the contract was made, and made in Missouri, to be performed in Logansport, Indiana. It is the general rule that in conflict of laws, matters connected with the performance of a contract are regulated by the law of the place of performance. *Broken v. Birchall*, 150 Pa. St. 164; but the *lex loci contractus* generally governs as to the validity and the construction of the contract and the capacity of the parties to make it, unless made with special reference to the place of performance, or concerning real estate. Thus in *Ruhe v. Buck*, 124 Mo. 178, it was held that matters bearing on the execution, the interpretation and validity of a contract are determined by the law of the place of its execution, and that matters respecting the remedy such as bringing suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where suits are brought, following *Scudder v. Bank*, 91 U. S. 406, wherein it was held as to a bill of exchange drawn by a party in Chicago upon a firm in St. Louis and verbally accepted by a member of the firm then in Chicago, that the validity of the acceptance was to be determined by the laws of Illinois. To the same effect is *Richardson v. DeGiverville*, 107 Mo. 422; *Forepaugh v. Railroad*, 128 Pa. St. 217; *Curnaw v. Ins. Co.*, 37 S. C. 406; *Miller v. Wilson*, 146 Ill. 523; *Ins. Co. v. Force*, 142 N. Y. 90. The same rule is applied to the contracts of married women. *Milikin v. Pratt*, 25 Mass. 374; *Holmes v. Reynolds*, 55 Vt. 39; *Bond v. Cummings*, 70 Maine, 125; *Taylor v. Sharpe*, 108 N. C. 377."

Throughout the opinion Judge Bland did not consider or hold that the residence of the parties had anything to do with the *lex loci contractus*. Indeed, the very phrase *lex loci contractus* excludes the idea that anything but the place of making the contract has anything to do with the question.

In the above case, at p. 592, Judge Bland cites approvingly the above case of *Insurance Co. v. Simons*, 52 Mo. App. 357.

In the case of *Summers v. Fidelity Mutual Aid Asso.*, 84 Mo. App. 605, it appears that the defendant association was a California insurance company doing business in Missouri, under the laws thereof, the same as the defendant, New York Life Insurance Company, in these cases. The Kansas City Court of Appeals which decided the case, adjudged the following proposition:

"An insurer organized under the laws of California where the contractual limitation for bringing suit is valid though less than the statutory period, provided in its application signed by the assured that the contract should be a California contract. In fact the contract was made in Missouri where the insurer was licensed to do business. *Held*, Insurer cannot introduce into its policies terms which are forbidden such corporations by Missouri laws."

In the case of *Herf Chemical Co. v. Lackawanna Line*, 100 Mo. App. 164, l. c. 179, the St. Louis Court of Appeals held as follows:

"Where a contract of shipment is made in Missouri between a resident corporation of that state and a carrier having an office and doing business there, such contract is governed by the laws of that state, and the carrier is not required to notify the consignee of the arrival of the shipment after it arrives at the destination on time."

In that case, the plaintiff, chemical company, sued the defendant railroad company because of the negligence of the carrier in failing to notify the consignee of the arrival of a shipment. If the contract was made in the State of Missouri where the shipment was made, the notice was not required on the part of the carrier. The shipment was from St. Louis to New York City, and was to be delivered to a corporation in said New York City.

In the opinion (p. 179) the court said:

"No notice to the consignee of the arrival of the goods, shipped by railway, is required under the laws of Missouri, where the shipment arrives on time. *Gashweiler v. Railroad*, 83 Mo. 119, and authorities cited. The contract of shipment was made in Missouri, between a resident corporation of Missouri and a corporation having an office and doing business in Missouri, and is governed by the laws of Missouri. *Gunter v. Bennett*, 39 Tex. 303; *Robinson v. Merchants Dispatch Co.*, 45 Iowa, 470; *Pennsylvania Co. v. Fairchild*, 99 Ill. 260; *First National Bank v. Shaw*, 61 N. Y. 283."

In the case of *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210. The Kansas City Court of Appeals decided as follows:

"Where a society is organized in one state and permitted to do business as a foreign corporation in another state the statute of the latter will determine who can be beneficiaries in causes originating therein."

In the opinion in the case, at p. 214, Judge Ellison, who wrote the opinion of the court, says:

"In cases where a society may depend for its power to do business on the statutes of two states, one where it is organized, and the other wherein it is permitted to do business as a foreign corporation, the statute of the latter will control as to who can become beneficiaries in cases originating in the latter." Citing *Baltzell v. Modern Woodmen*, 98 M. A. 153.

In the case of *Crossman v. Lurman*, 192 U. S. 190, this court adjudged the following proposition, viz:

"A contract made in New York, for the sale of goods to be delivered and stored in New York on arrival from a foreign port is a New York contract governed by the laws of New York even though the buyers be residents of another state."

In that case, the facts showed that the sellers Crossman & Brothers were residents of New York City, that a contract of sale was made in that city between them and the firm of Lurman & Company, who were residents of Baltimore, Maryland, and who were purchasers of certain coffees.

In the opinion at page 198, this Court by Mr. Justice White, says:

"It is insisted that, even although it was in the power of the State of New York to legislate for the prevention of fraud and deception by forbidding the sale of the adulterated food products, such prohibition could only operate upon contracts made within or intended to be executed within the state, and as the contract here in controversy was not of such character, therefore the law of the State of New York was erroneously held to control. This proposition was based on the assumption that because the buyers of the coffee were residents of Maryland, therefore the contract must be treated as having been made for the purpose of securing the shipment of the coffee from Rio Janeiro to the residence of the buyers, hence the City of New York was referred to in the contract merely

as the port of entry. * * * The contract of sale was made in New York; the storage and delivery in the City of New York was therein provided for. It was clearly, therefore, a New York contract and governed by the laws of New York."

Here we have another instance where the court is required to determine the question of *lex loci contractus*, but where the court, did not consider the residence of the parties as having any influence or significance in the determination of the question.

In all of the cases which we have cited and generally in cases that might be cited, the parties to the contract where the contract is one involving the question of *lex loci contractus* reside in different states. The question of *lex loci contractus* does not arise ordinarily where the parties to the transaction are purely domestic, that is, where the parties live in the same community and where the contract is made and executed in the place of their residence. The question generally arises where parties are citizens of different states, and because of the nature of the transaction they make the contract in a state other than the one where they both, or one of them, at least, reside.

In the case at bar, the insurance company had a residence in Missouri, which was acquired by the permission which it obtained to do business in Missouri under Missouri laws. So far as the insurance company is concerned the cases are the same as if the New York Life Insurance Company had been incorporated in Missouri, and the transaction of the business in these two cases in Missouri, by Mr. Head, was the same as if he had resided in Missouri, for the reason that he had the same right to come into Missouri and do business without a special permit as the New York Life Insurance Company had to come into Missouri and do business under and with a special permit.

Very much of the business in our day and time that is transacted in any state is between persons who are neither residents or citizens of that state. All interstate contracts and transactions are of that character. Indeed, the business of a state at the present time which is purely intra-state is a small portion of the volume of its business. However, all contracts are deemed to be made with reference to some law, and the unvarying rule on this subject, apart from real estate transactions, is that contracts are deemed to be governed upon the question of validity and interpretation by the laws of the state where they are made. No other rule is practical. It would be impossible as respects all contracts made between citi-

zens of different states, to make a rule governing them by the laws of the state of the residence of the parties. They have no common residence.

In this case, as we have seen, the New York Life Insurance Company is a resident of Missouri. Mr. Head was a resident of New Mexico. The contracts were made in Missouri. That cannot be denied. Now if the contract is to be deemed, notwithstanding it is physically made in Missouri, to have been made where the parties reside, then was it a Missouri contract where the New York Life Insurance Company had its residence, or a New Mexico contract, where Mr. Head resided. The rule is, we repeat, that the contract is to be deemed governable by the laws of the state where it is actually and physically made. If it be said it is competent for the parties to provide in the contract the state whose laws shall govern the contract, as was done herein, we answer that while that is sometimes done where that stipulation does not conflict with the laws of the state where the contract is actually made, it is not competent, according to the rulings of the courts, for parties to make a contract in Missouri contrary to the laws of that state, which enter into the contract, and provide in defiance of the laws of Missouri that that contract shall be governed by the laws of New York, Massachusetts, Oregon or California. If, for example, a citizen of Kansas and a citizen of Illinois were to come into Missouri and make a note for five thousand dollars, payable at the usurious rate of interest of ten per cent per annum, and secure that note by a chattel mortgage on a bunch of cattle in Missouri, it would not be competent for those parties to stipulate either in the note or in the chattel mortgage, that the contract should be governed by the laws of some other state where the transaction would be valid and where the chattel mortgage would not be void as in Missouri. Such a chattel mortgage would be absolutely void in Missouri, under the interest laws of Missouri, and neither that chattel mortgage or any contract made in its execution, extension or renewal would be valid. For the same reason neither the stipulation in the policies in these cases providing for the government of the contract by New York laws, or the stipulation in the loan contract made pursuant to and in execution of each of these same policies and likewise providing for the governing of that contract by the laws of New York, can control. The laws of Missouri having entered into and constituted a part of the original policies in these cases then became a part of those policies.

Apart, however, from the foregoing considerations and citations, we submit that the contention of counsel of the insurance company to the effect that Missouri laws do not apply in cases where the policy-holder is a non-resident of the State of Missouri, would, if sustained, involve a violation of that part of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of its laws. The concluding clause of Section 1 of Article 14 of the Amendment to the Constitution of the United States, reads as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. Head was in Missouri when the contracts in these cases were made. He was within the jurisdiction of the State of Missouri. Counsel contend that he is not entitled to the same protection of the insurance laws of Missouri as he would have been had he been a resident of the State of Missouri.

In the case of *Yick Wo v. Hopkins*, 118 U. S. 356-369, this Court adjudged the following propositions:

"A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provisions of the Constitution of the United States, if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying, or of the propriety of the place selected, for the carrying on of the business.

"An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits violates the provisions of the Constitution of the United States, if it makes arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances.

"The guarantees of protection contained in the Fourteenth Amendment of the Constitution extend to all persons within the territorial jurisdiction of the United States, without regard to difference of race, of color, or of nationality.

"Those subjects of the Emperor of China who have the right to temporarily or permanently reside within the United States, are entitled to enjoy the protection guaranteed by the Constitution and afforded by the laws."

In the body of its opinion in the case, at p. 369, this court used the following language:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. *It is accordingly enacted by Sec. 1877 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.* The questions we have to consider and decide in these cases, therefore, are to be treated as involving the right of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

In the case of *Missouri Pacific Railway Co. v. Mackey*, 127 U. S., 205, l. c. 209, this Court says:

"Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed."

However, in the cases at bar, counsel of the New York Life Insurance Company solemnly insist that, although the circumstances of the making of these contracts by Mr. Head with the Insurance Company were "under similar circumstances and conditions" as if he had been a resident of Missouri, still he cannot have the benefit of Missouri insurance laws because he resided in New Mexico and not in Missouri.

In the case of *Duncan v. Missouri*, 152 U. S. 377, this Court adjudged that:

"Due process of law, and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the case of *Frazer v. McConway & Torley Co.*, 82 Fed. 257, the United States Circuit Court for the District of Pennsylvania adjudged the following propositions:

"The Pennsylvania law of June 5, 1897, imposing on every employer of foreign-born unnaturalized male persons over 21 years of age a tax of three cents a day for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employes, deprives the latter of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"The equal protection of the laws declared by the Fourteenth Amendment of the Constitution, and enforced by the laws of the United States, is not confined to citizens, but secures to every person within the jurisdiction of the state exemption from any burdens or charges except such as are equally laid upon all others under like circumstances."

The opinion in the case only covers two and a half pages, and seems to be a very brief and concise statement of the law applicable to that case arising from the above provisions of the Fourteenth Amendment.

In the case of *Templar v. Barber's Board of Examiners*, 131 Mich. 254, the Supreme Court of Mich. adjudged the following proposition:

"The provisions of Sec. 5 of the Barber's License Law (Act No. 212, Pub. Acts 1899) that no alien shall be entitled to a certificate is repugnant to the Fourteenth Amendment to the Federal Constitution, as denying the equal protection of the laws."

So, in *Steed v. Harvey*, 18 Utah, 367, the Supreme Court of the State of Utah adjudged the following:

"The provision of the Fourteenth Amendment to the Constitution of the United States declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, secures to every person within the jurisdiction of the state, though not a citizen or even a resident, the protection of its laws equally with its own citizens and entitles him to the same remedies."

The case of *Pearson and wife v. City of Portland*, 69 Me. 278, was an action to recover damages, by the plaintiff, Mrs. Pearson, for injuries from a defective way in said City of Portland. The

plaintiff, Mrs. Pearson and husband were residents of Cuba and had no residence in the State of Maine. They only had a residence in Maine for temporary business purposes. It was claimed by the City of Portland that the action of the plaintiffs was barred because of a statute of the State of Maine, which read as follows:

"No person shall recover of any city or town in this state, damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, townway, causeway or bridge, provided the said damage be done to or claimed by any person, who was at the time said damage was done a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country."

The Supreme Court of Maine, in expressing its opinion of this statute, used the following language:

"The only question we find it necessary to consider is whether this act is constitutional. We think it is not. It is in conflict with the 14th amendment of the United States Constitution, which declares, among other things, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' By the general statutes in force in this state at the time of the passage of this act (and still in force), every person sustaining an injury, in person or property, through any defect or want of repair, in any highway, townway, causeway or bridge, could recover for the same, in an action on the case of the town, city or county whose duty it was to keep the way in repair. R. S. c. 18, Sec. 65. This is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their ways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. And it is universal in its application. It protects everyone alike. The act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this state at their peril, and without that protection which the law affords to all others. They may be citizens of the United States and of this state, and within its jurisdiction at the time of injury; still, they are denied redress, denied 'the equal protection of the laws,' on account of the condition of the law of a foreign country, for which they may be no more responsible than they are for the color of their eyes or the color of their skins. The denial might as well be based on race or color

as upon the law of a foreign country; for the parties to be affected by it may be as powerless to change the one as the other. The general statute may undoubtedly be repealed; but the court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the state, it must remain in force for the protection of all others similarly situated.

The plaintiff was within the jurisdiction of the state at the time of her injury."

In the cases at bar, it appears that Mr. Head was in the State of Missouri when these contracts for policies in these two cases were made. Besides, the opening paragraph of Sec. 1 of Article 14, provides that:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or inflict any law which shall abrogate the privileges or immunities of citizens of the United States."

The applications for these policies which are made a part of the policies, recite that Mr. Head was born in the State of Missouri. This fact gives him the rights of the above quoted opening paragraph of Sec. 1 of Article 14.

III.

Sections 5856 and 5858 at pages 1385 and 1386 of Volume 2 of the Revised Statutes of Missouri, 1899, in the chapter and article relating to life insurance, and copied in our preceding statement, were in force when these policies were issued in 1894, and those sections of the law became and were and are a part of the policy sued on. It follows that all provisions and terms of the policy in conflict with those statutes are void.

According to the rule of said Section 5856, the policies sued on, had a net value at the time of Mr. Head's default in 1905 which continued it over four years thereafter. About a year thereafter he died. According to the statutes of New York, relied upon by defendant, neither policy had any present value in the year of 1905 at the time of Mr. Head's default, but that result is obtained under the laws of the State of New York which provide for computing and including in the computation by which that result is reached, the loan of \$2270. The officers of the company in New York,

however, all agree that if that loan indebtedness is not included in the computation the policy had a value at the time of Mr. Head's default in 1905 sufficient to continue it far beyond the period of his death, for the full amount of the policy. It is not seriously contended that the loan indebtedness could be included in making the computation under the Missouri statute. Said Section 5856 provides as follows:

"It (the policy) shall be subject to the following rules of commutation, to-wit: The net value of the policy when the premium becomes due and is not paid shall be computed on the American experience table of mortality with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value *any notes or other indebtedness to the company given on account of past premium payments on said policy issued to the insured*, such indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance, for the amount written on the policy." This section is copied in full in our foregoing statement.

The only indebtedness under the statute which can be computed or taken into consideration in arriving at the net value of the policy, is indebtedness on "account of past premium payments" on notes given on account of past premium payments.

This section of our statute was fully considered and finally construed and determined by the Supreme Court of the state, in the case of *Cravens v. Insurance Co.*, 148 Mo. 583, affirmed by this court in *N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, and also in the case of *Smith v. Mutual Benefit Life Insurance Co.*, 173 Mo. 329, and also *Burridge v. Ins. Co.*, 211 Mo. 158-178.

In the Smith case it was explicitly adjudged by the Missouri Supreme Court, as follows:

"In applying the net value of the policy to paying for extended temporary insurances, loans made to the assured by the company on the policy cannot be deducted from the net value of the policy. If the amount of the assured's indebtedness 'on account of past premium payments' is deducted from the net value of the policy, and the balance if applied to the payment of premiums will extend the policy beyond the date of the assured's death, the company cannot shorten that extended period by deducting the loans it has made to the assured. The Missouri statute authorizes no such deduction."

It was also held in that case, that :

"An express agreement in the policy, *or subsequently*, that loans made the insured may be deducted from the net value of the policy in applying that value to extended temporary insurance, will not authorize such deduction, because the statute does not permit such a contract."

It was also held in that case that :

"The statute has no concern with the relation of borrower and lender between the insurance company and the policy-holder, except when it relates to money borrowed from the company to pay premiums."

All of the premiums in these cases were paid as they became due, down to April, 1905. Then when the default of 1905 occurred, the company held no note or indebtedness of Mr. Head for premiums, and there was no premium due and payable except that for 1905 amounting to \$425. The loan note included one premium of \$425 and another sum of \$310, the same amounting with interest to the sum of \$841.70, the sum mentioned in his testimony by Mr. Reynolds, and deducting this amount Mr. Reynolds showed that the policy had a net value sufficient to carry it far over four years. This evidence is uncontradicted (Mary E. Head, Record pp. 31, 42, 101 ; Richard G. Head, Jr., Record p. 49).

IV.

It follows from the foregoing that plaintiffs in these actions were entitled to the judgments given as prescribed in said Section 5858 of the Revised Statutes of 1889, also copied in our foregoing statement, for the full amount of \$10,000, the amount of each policy less the amount of the loan of \$2270 and interest, and less the premiums of \$425 each for 1905 and 1906, with interest as provided by that section. This result will be obtained by adding together the credits of the \$2270 and the two premiums of \$425 with interest to July 6, 1906, when the policies should have been paid, and then computing interest at six per cent on the balance from July 6, 1906, to the date of the finding and judgments in these actions.

To the contention by the defendant that plaintiff Mary G. Head is not entitled to a judgment because of the claim that there was an election to take a paid-up policy, we answer that, notwithstanding there was a request made by the deceased and plaintiff in that action for a paid-up policy, yet that request was not complied with by defendant. No paid-up policy, as required by and under Section 5857, was ever issued by defendant. The defendant does not claim to have ever issued a paid-up policy. Under that section of the Missouri Statute, in order for defendant to claim the benefit of a bar to a recovery in this action by said plaintiff under Section 5856, on the ground of a paid-up policy, the defendant must make it clear and must have established that Section 5857 was complied with by the defendant issuing a paid-up policy under circumstances which had the legal effect of extinguishing the old policy.

The concluding proviso of Section 5857 is, that the old policy shall be surrendered and legally discharged at the parent office of the company. That statute contemplates the issuance of a new policy in lieu of the old one. That was not done in this case. The old policy did not cease to have force and effect. No new paid-up policy was issued. The defendant does not claim that anything done by it, or by the parties, with respect to the paid-up policy, was done under or pursuant to Section 5857 of the Mo. laws of 1889, relating to a paid-up policy.

It cannot be claimed by defendant that the request not complied with by the insurance company, of the plaintiff and her father for a paid-up policy, had the force and effect under the Missouri statute of abrogating the old policy, or that it had the same or a similar effect as the issuance of a new policy. The defendant claims and claims constantly and persistently, that all it did with respect to a paid-up policy was done under the contract of the parties. Claiming that that contract, as the defendant does, had force under and by virtue of the laws of New York, we submit that the defendant cannot occupy in this case an inconsistent attitude. It cannot claim that this contract is a New York contract governable by the laws of that state, in one breath, and at the same time claim that that contract has force and effect also under the conflicting laws of Missouri.

We claim that the contract is governable throughout by the laws of Missouri. We claim that there never was a paid-up policy

in this case, because the laws of Missouri respecting paid-up policies were not complied with. And it was one of the clear, distinct, positive propositions adjudged by the Missouri Supreme Court in the Cravens case, which was affirmed by this court, that there was no paid-up policy in that case, because the said statute of Missouri in regard to paid-up policies was not complied with.

In that case, the trial court gave a judgment as upon a paid-up policy and refused to give a judgment as for extended insurance under the next preceding section of the statute; but the Missouri Supreme Court reversed that judgment, holding that the judgment of the trial court based on the paid-up policy section of the statute, was erroneous and that the plaintiff was entitled to the full amount of the policy under the next preceding extended insurance section.

What was decided by the Missouri Supreme Court in that case, is the precise judgment given in these cases. We contend for the judgments for the full amounts based on the extended insurance section of the statute.

It is contended by defendant's counsel that the application for a paid-up policy by the plaintiff and her father, was an election by them to take paid-up insurance. Even if this is conceded to be so, still that election does not bind the plaintiff, because it was disregarded and held by the defendant not to be binding upon it. In other words, at the time when defendant could have made that election available by issuing a paid-up policy in compliance with the paid-up policy Missouri statute, defendant refused to do so. The evidence shows that the plaintiff and her father did not know what amount they would be entitled to if a paid-up policy were issued, when they made the application therefor. They were in ignorance on the subject. Where a party makes an election in ignorance of their rights, the election is not binding, especially where that election is not acted upon by the opposite party. Again, election in order to bind a party must bind both parties. It stands upon the same basis as an estoppel. These propositions have been repeatedly adjudged by the courts.

Johnson-Brinkman Co. v. Bank, 116 Mo. 574.

Trimble v. Wollman, 71 Mo. App. 467, 1. c. 485.

Bowman v. Leckey, 86 Mo. App. 47, 1. c. 63.

Standard Oil Co. v. Hazekins, 74 Fed. 395; 20 C. C. A. 468.

In view, therefore, of the ignorance of the plaintiff and her father of the amount to which plaintiff was entitled on a paid-up policy, and in view of the fact that defendant at the time when it could have accepted the request for a paid-up policy, refused to issue one under the Missouri statute, and since elections must mutually bind both parties, the defendant never became bound in this case by the provisions of the Missouri statute regarding paid-up policies, and it results that the rights and obligations of these parties must be determined by the preceding section of the statute in regard to extended insurance. This view of the case that the paid-up policy statute of Missouri does not apply results, we repeat, from the fact that the defendant never issued a paid-up policy under that section of the statute.

The amount of \$89 which is tendered by the defendant is not the amount due as upon a paid-up policy under the Missouri statute, but is claimed to be the amount due as upon a paid-up policy under the New York statute, which does not apply to this case. We repeat that the defendant cannot say that it issued a policy for the amount that plaintiff was entitled to under the Missouri statute. The time has gone by when the defendant can avail itself of the provisions of the paid-up policy statute of Missouri, by issuing a paid-up policy under that statute for the amount due. On the evidence of Mr. Reynolds, a paid-up policy under the Missouri statute less the present worth of the indebtedness would have entitled the plaintiff to about \$1,500.00. The words "net reversionary value" of debts for premiums employed in the paid-up policy section means the present worth of debts payable at some future time.

It is contended by defendant that, to ascertain the amount of the paid-up policy under section 5857 of the Missouri Revised Statutes of 1889, which provides for a paid-up policy, the company would have the right and option to deduct the loan indebtedness of \$2270 or the present value of that indebtedness.

We do not assent to this proposition. Under the decisions of the Missouri Supreme Court in the Cravens, Smith and BurrIDGE cases, a loan indebtedness pure and simple cannot be considered in determining the rights of the parties under our insurance laws. There is no ground for saying that a different construction in this respect should be given to Section 5857 than that which the courts have given Section 5856 of the Revised Statutes of 1889. Sections 5856, 5857 and 5858 are all statutes in *pari materia* and must be considered and construed together. Considering those statutes

together, the undoubted result of them all is to exclude from computation or consideration under all of those sections, any and all indebtedness by way of loans merely. The phrase in Section 5857 consisting of the words, "*All indebtedness to the company on account of such policy,*" means the same as the phrase in Section 5856 consisting of the words, "*Any notes or other indebtedness to the company given on account of past premium payments on said policy issued to the insured.*" The two clauses of the two sections mean the same thing. There is no reason for saying that the word "debts" or "indebtedness" in one section means one set of debts, while in the other section it means another set of debts. *A debt by way of a loan is not "an indebtedness to the company on account of the policy."*

Since, therefore, the insurance company did not during the lifetime of Mr. Head avail itself of the provisions of the paid-up policy Missouri statute, being Section 5857 of the Revised Statutes of 1889, it cannot now claim that the plaintiff is confined to a judgment for such amount as would be due if the defendant had availed itself of said paid-up policy statute by issuing a paid-up policy thereunder. This point does not arise and is not made in the Richard G. Head, Jr., case.

VI.

It is claimed by defendant's counsel that a different result follows in this case because at each time that a loan was made, what is called a new agreement was made by these parties. It cannot be denied that under the decisions the agreement of the parties at the time of the making of the policies making them New York contracts, must give way to the statutes of Missouri. But the same result follows from the making of any new agreement, especially where contemplated by the policy. This point was expressly adjudged in the case of *Smith v. Mutual Benefit Life Ins. Co.*, 173 Mo. 329, 1. c. 341, 342, 343.

In that case the policy was issued June 10, 1884. Afterwards in 1896, the parties made an amendment to the policy, which amendment is to be found at pp. 337-338 of the opinion in that case. It was expressly held in that case that the amendment was without force.

On this point the court, in its opinion, at p. 341, used the following language:

"And if the parties could not in the beginning place themselves out of the policy of the law, *they could not by an amendment to the contract do so.* There is a great deal of technical learning in the subject of life insurance and our lawmakers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of that subject to the experienced officers of the insurance company and for that reason have written into such contracts some provisions which *the parties to them cannot avoid.* We hold, therefore, that the provisions of our statutes could no more have been avoided by the amendment to the policy in 1896, than by the original policy. And we hold, also, that the statute declaring that in ascertaining the net value of the policy it shall be computed upon the American experience table of mortality with four and a half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on such policy issued to the insured, which indebtedness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy," does not mean that indebtedness incurred by the assured for money borrowed from the company may also be deducted. The statute means only what it says, that indebtedness on account of past premium payments shall be deducted."

It follows that amendments which are claimed to have been made in these cases to the policies sued on, by either of the loan agreements, is without force and effect as against the Missouri statutes. Besides, the amended statute of 1903, relied upon by defendant (Session Laws of Mo. 1903, p. 208) only applies to policies thereafter issued. It has no application to the policy in this case. Nothing is better settled in Missouri than that all statutes operate prospectively, and never retrospectively.

Blumm v. N. Y. Life Ins. Co., 197 Mo. 513.

State v. Mer. Co., 184 Mo. 160, 1. c. 185.

See also as precisely in point:

Burridge v. New York Life Ins. Co., 211 Mo. 158, 1. c. 178; 109 S. W. Rep. 560.

Christensen v. N. Y. Life Ins. Co., 152 M. A. 551; 134 S. W. Rep. 100.

In these cases the terms of the policies provided and stipulated for the subsequent loans made in 1904. Therefore the loan contract was not an independent contract.

Burridge v. Ins. Co., *supra*.

The Missouri statutes hereinbefore copied, regulating loans in cases of default became a part of each policy when issued, and the loans provided for in each policy were subject to those statutes. It was therefore the right of Mr. Head and of his children to make the loans accordingly, and the company had no more right or power in the new so called loan contracts to make the policies New York contracts, than it had in the policies themselves.

VII.

The propositions maintained by defendant go upon the basis of payment of the premium at the time of making application for insurance. The cases cited by defendant's counsel were cases where such payment of the first premiums were made at the time of sending in the application and there being a death shortly thereafter, the question in those cases was whether the premium having been paid in advance the insurance took effect from the time of the mailing of the policy addressed to the policy-holder or from the time of actual delivery to him. There was no question in any of those cases as to whether the contract was a contract of one state or another as in cases at bar. The rulings of the courts in those cases seem to have been that, where the applicant for insurance did all that he was required to do to make a binding contract on his part at the time of making the application, by sending along with the application the advance premium, and the insurance company, on the receipt of the application and the advance premium, manifests the company's acceptance of the contract by mailing to him a policy, then the contract takes effect from such acceptance upon the basis that the minds of the parties have met.

But that is not this case. Here, the assured, Mr. Head, had not paid his advance premium in either of these cases, at the time of making or sending forward the application. He made the application for insurance through Mr. Magill, who acted as solicitor under defendant's Kansas City branch office. There was one application for both insurances. That application was delivered to Mr. Magill, the solicitor of the insurance company in Kansas City, Mo. Mr. Magill took Mr. Head's note for both advance premiums at the time of application. That note was made payable personally to Mr. Magill. Afterwards, when the policies came back to the office in Kansas City, they were delivered, as the uncon-

tradicted evidence shows, to Mr. Head, or to his attorney, and the premiums were then paid to Mr. Magill and the contracts then took effect. The contracts had not taken effect before because the premiums were not paid until the policies were delivered to Mr. Deatherage, who was Head's attorney. Contemporaneously with the delivery of the policies to Mr. Deatherage for Mr. Head, Magill, the agent, paid the premiums, and Mr. Head paid Magill by giving a draft or check on the Drumm Commission Company.

On these facts, counsel have not produced any authority that the policies took effect as contracts until their delivery at Kansas City and the payment by Magill for Mr. Head of the premiums. A glance at the policies will show that there was no binding contract against or for Mr. Head until he actually paid the premiums.

On the first page of the policy in each case, we have the following language:

"This contract is made in consideration of the written application for this policy and of the agreements, statements and warranties thereof which are made a part of this contract, and in further consideration of the sum of \$425 to be paid in advance, and of the payment of a like sum on the 3rd day of April in every year thereafter during the continuance of this policy."

This is a paragraph from the policy in each case, on the first page thereof, and demonstrates that there was no insurance in this case until the payment of the advance premium. The first premium was to be paid in advance upon the issuance of the policy. Such is the language contained in the policy.

Again, on the second page of the policy, under the head of "Benefits and Provisions Referred to in this Policy," is, among others, the following provision:

"No agent has power in behalf of the company, to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation on information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated. All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be made through agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and counter-signed by such agents. If

a premium is not thus paid on or before the day when due, then, except as hereinafter otherwise provided, this policy shall be void and all payments previously made shall remain the property of the company."

These provisions demonstrate, if demonstration be necessary, that the policies did not take effect from the time they were mailed from New York City, for the reason that the advance premium was not paid by Mr. Head in either case until the receipt in Kansas City of the policies.

The provision on the first page of each policy is as follows: "The benefits and provisions placed by the company on the next page, are a part of this contract as fully as if recited over the signatures hereto affixed." The clause above cited is from the benefits and provisions referred to in the policy, and is thus made a part of the policy.

It will be observed from the policy that the company did not receive payment by Mr. Head in either case, of the advance premium, but the contract recites the written application and then provides that if the advance premium be not paid the contract of insurance shall be void, or in other words, without any effect. Even if the policies had been delivered to Mr. Head without the payment of the premiums, the policies would never have taken effect or been valid and binding contracts, for the reason that the above clauses quoted from the policy indicate that if the advance premium was not paid the policy should be without effect, or, in other words, should not take effect.

Again, in Mr. Head's application for this insurance, and on page 3 of the policy in each case, among the agreements which are stipulated between the defendant Insurance Company and Mr. Head, is the following:

"4. That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said Company or its authorized agent during my life time and good health."

It follows from this and the other above quoted provisions of the policy, that the policies in these cases did not take effect when mailed from New York City here, for the reason that at that time Mr. Head had not paid any premiums. He had given a personal note to Mr. Magill, but that was not payment. The giving of a note is not payment unless it is so expressly agreed. *Segrist*

v. Crabtree, 131 U. S. 287-289, 22 Am. & Eng. Enc. of Law, (2d Ed.), 555. As between Mr. Head and the New York Life Insurance Company, neither of the advance premiums in these cases were paid until they were paid by Mr. Magill for Mr. Head. The giving of Mr. Head's note personally to Magill was not payment. Mr. Magill did not have the authority to bind, and did not bind the Insurance Company by taking that note. The giving of the note by Mr. Head to Mr. Magill was conditioned upon the acceptance by the Company in New York of the insurance. The giving of that note was wholly without effect as between Mr. Head and the Insurance Company, and as between Mr. Head and Magill, the giving of that note was actually conditioned upon the granting of the insurance by the company in New York. If the Company should send policies to the agents in Kansas City and Magill should make payment of the premium therein for Mr. Head, then he would owe Magill the amount of that note; but if, on the other hand the Company should reject the application for the insurance and should not send the policies, then Mr. Head would not owe Magill anything. The contracts therefore did not take effect until Magill made the cash payment to the branch office of the defendant Company in Kansas City, and when those payments were made, the contracts for the first time took effect, and they took effect in the State of Missouri where the premiums were paid and not in the State of New York.

The proposition above stated that the policies in these two cases took effect as contracts when the premiums were paid in Kansas City, is amply supported by the authorities cited. In these cases the policies were not mailed to Mr. Head but to defendant's branch office at Kansas City, Mo.

VIII.

The proposition contended for that the amendatory act of March 27, 1903, to be found at page 208 of the Missouri Session Laws of 1903, applied to these cases, cannot be sustained. The rule that statutes operate prospectively and not retrospectively prevents that statute from applying to either of these policies or either of these cases. If applied retrospectively, then said statute as to these policies is void.

State ex rel. Hacussler v. Greer, 78 Mo. 188.

Lecte v. Bank of St. Louis, 115 Mo. 184.

This latter is the case in which the Missouri Supreme Court held that the married woman's act of 1873 did not apply to marriages or affect the marital rights of husbands in cases where the marriages took place prior to said married woman's act. It was decided in that case, that the application of said married woman's act of 1873, to the marriages then in existence or to rights which had then accrued would be violative of the constitutional provision prohibiting the enactment of a law retrospective in its operation.

We submit that these cases must be decided without any reference to said act of 1903.

Burridge v. Ins. Co., 211 Mo. 158-178.

Christensen v. Ins. Co., 152 M. A. 551.

IX.

Did the loan contracts of 1904 and 1905 change the policies of insurance in these cases, as contended by defendant's counsel?

The policy of these Missouri statutes, being the three sections applicable to these cases by which extended insurance is provided for, is based upon the relation of the parties, the insurer and insured. In these cases at bar, three distinct relations existed between the parties, one was the relation of insurer and insured; another was the relation of lender and borrower of money; another relation which existed between the parties was that of pledgor and pledgee. Each and all of these three relations are fiduciary in their character, and the parties in contracting with one another stood very much in the same plight as a guardian and ward, a principal and an agent, an attorney and a client, two partners in a partnership, and other kindred fiduciary relations. The relation of these parties of pledgor and pledgee was the same in substance as the relation of mortgagor and mortgagee, which relation involves the idea of trust and confidence.

The statutes regulating the subject of usury are based upon this fiduciary dependent relation of borrower and lender, and proceed upon the theory that the legislature as well as courts of equity may properly protect the dependent subordinate parties by providing a rate of interest which the parties may not change by contract. So in the case of mortgagor and mortgagee, pledgor and pledgee, there exists in each case an equity of redemption which the parties may not contract away. Even in the case of a mortgage where the parties stipulate against the right of redemption, the

right of redemption still exists under the law, and it is not competent or possible for the parties to contract away the right of redemption in the cases of mortgages and pledges.

This was expressly ruled and decided at a very early day by the Missouri Supreme Court, in the case of *Wilson v. Drumrite*, 21 Mo. 325. The proposition decided in that case was that, "Every conveyance, intended as a security for money, is a mortgage, and no agreement of the parties at the time can take away or limit the right of redemption."

In that opinion, at p. 329, Judge Leonard, speaking for the Supreme Court, said:

"It may be admitted that the defendant refused to take a mortgage, and that it was expressly agreed between the parties that there should be no reconveyance of the land except upon the condition of punctual payment at the times indicated; yet, the conveyance was given and taken as security for money to be paid, and therefore for that very reason is, by the law of the land, a mortgage—a redeemable conveyance, and it was not in the power of the parties to make it otherwise."

Sometimes it has been held in mortgage cases that, upon the maturity of the indebtedness it is competent for the mortgagor to sell the mortgagee the property mortgaged, in full satisfaction of the debt. But even in that class of cases, the courts have held, in view of the fiduciary and dependent relation of the parties, that there must be a full consideration for the transfer and conveyance and unless there be such, any conveyance and transfer of the mortgagor to the mortgagee is void.

It can hardly be contended that these loan contracts were valid. There are several reasons for this. The right to extended insurance, accrued under Sec. 5856 of the Insurance Co. hereinbefore copied away back in 1896 after two annual premiums had been paid. After the payments of two premiums as contemplated and required by the extended Missouri insurance statute, then the right to extended insurance under that Missouri statute, which was a part of these policies attached in favor of Mr. Head and plaintiffs and as we have seen that right attached away back in 1896, two years after the issuance of these policies. The right to extended insurance in these cases, we repeat, accrued under the extended insurance statute, Vol. 2, R. S. Mo. 1889 Sec. 5856. Not only that but long after Mr. Head and plaintiffs acquired the vested right to extended in-

surance following the two first payments, he practically got in default about the time of these loan contracts. Of course when he got in default in paying his premiums, then the vested right to extended insurance acquired after two payments became still more complete and consummate. That was his condition when these loan contracts were made. The dependent condition of Mr. Head had then become more intensified and more deserving and more requiring that protection which originally was given by courts in this class of cases, but which is afforded by the Missouri statutes with respect to these insurance contracts. Mr. Head had the right initiate to extended insurance and to the payment of these policies in full at and 8 years before the time of these loan contracts.

For these reasons the statutes of Missouri governing these insurance policies subsisting between parties sustaining fiduciary and dependent relations, cannot be changed by the parties. The reason and policy of those statutes become perfectly apparent when it is considered that these loan contracts were not made until after the insurance had run for over ten years and at a time when Mr. Head had become an old decrepit man and practically insolvent. Then the insurance company steps in and endeavors to defeat the policy and positive provisions of the Missouri statutes applicable to the cases, by making him a loan of \$2270 on each policy and in this way the insurance company endeavors to pay off an indebtedness of \$10,000 by \$2270. On the principle, that a mortgagee of a mortgage upon the maturity of the mortgage indebtedness cannot thus deprive the mortgagor of his property without paying full consideration for the property conveyed, certainly upon like principle, an insurance company ought not to be permitted to pay a \$10,000 indebtedness in the way that the defendant insurance company sought to do in these cases. For this reason it is that contracts like these loan contracts are held to be void, just as a usury contract is void notwithstanding the contracts of the parties, and just as contracts between mortgagor and mortgagee which do away with the right of redemption, are held to be void.

The principle which is applicable to this class of cases is well expressed by this court, in the case of *Villa v. Rodrigues*, 12 Wall. 339. In that case this Court in its opinion used the following language:

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous

and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears of poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

But counsel for defendant company seem to proceed upon the theory that these insurance companies, after their insured become old and decrepit, sick and necessitous, and need more than at any other time the protection of the law, may contract away rights of the insured so as to practically deprive them, after long years of payment of premiums, of their rights under their policies. Counsel seem to think that insurance companies, notwithstanding the relation which subsists between them and their dependent policy holders, have the unlimited right to make contracts as they please. According to this contention, a contract obtained by a guardian from his ward is a valid contract. According to the same contention, a contract with reference to the subject matter obtained by an agent from a principal, is perfectly valid. According to this same idea, a contract obtained by an attorney, with respect to the subject matter of his relation to his client, is valid.

The freedom of unrestrained power to contract has been more than once denied by the Courts. Thus, in the case of *State ex rel. v. Firemen's Fund Ins. Co.*, 152 Mo. 1, it was held that there is no such thing in civilized society as the unrestrained power to contract. That was a case of *quo warranto* to oust certain insurance companies for the violation of the anti-trust laws of Missouri, and this so-called unrestrained power to contract was denied.

So again, in the case of *State v. Cantwell*, 179 Mo. 245, the Mo. Supreme Court held as follows:

"The right of parties to contract is subject to the limitations which the state may lawfully impose in the exercise of its police power. This right does not deprive the state of its authority to interfere *where the parties do not stand upon an equality.*"

In that case the so-called unrestrained right of contract was held subject to the act of the Missouri Legislature which applied to a class of underground laborers who searched for minerals and engaged in mining.

In the opinion in that case, at p. 268, the Missouri Supreme Court, quoting from the language of the United States Supreme Court in the case of *Holden v. Hardy*, 169 U. S. 366, repeated the following language:

"The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self interest is often an unsafe guide, and the Legislature may properly interpose its authority."

This principle again found expression in the case of *Karnes v. Ins. Co.*, 144 Mo. 413. That was a suit on a fire insurance policy. The policy in that case contained the provision that "no suit against this company for a recovery of a claim under this policy shall be sustainable in any court unless begun within one year from the date of the fire." And it was held that that provision in the policy was in conflict with Section 2394 R. S. 1899, declaring all parts of a contract void that limit the time in which a suit thereon may be brought.

It was also held in that case that,

"Citizens do not have the absolute right to make all contracts they deem proper. The state may prohibit such contracts as contravene the policy of its laws."

It was further held that,

"Such a statute as the above is not unconstitutional, and a suit brought more than a year after the fire on an insurance policy containing such provision, is not barred, if not otherwise barred by the statute of limitations."

In that opinion the court said:

"It cannot be claimed that parties have the right to make any and all contracts they deem proper. The state has made and may properly make many regulations that will restrict this right. For instance, we have usury laws and their validity is unquestioned. Parties are not permitted to insert certain conditions in insurance contracts which would be perfectly legitimate, but for statutory prohibition. Yet the courts sustain these provisions and declare ineffectual any attempt by contract to evade or nullify the statute. *Equitable Society v. Clements*, 140 U. S. 226; *Harcens v. Ins. Co.*, 123 Mo. 403; and see, also, *Henry Co. v. Evans*, 97 Mo. 47."

The foregoing views and citations are in harmony and accord with the decisions of the Missouri Supreme Court in the case of *Smith v. Mutual Benefit Life Ins. Co.*, 173 Mo. 329. The decision in that case is an explicit adjudication which has been more than once repeated by the court, that the relation of borrower and lender in this class of cases is entirely different from the relation of insurer and insured, and that contracts between the parties as borrower and lender cannot be procured to defeat the policy of the laws in regard to insurance contracts, whether those loan contracts are made at the time of the issuance of the policy or made thereafter. As to the policy of these insurance laws, the remarks of the court in that case are so complete and so conclusive that we copy the following extract from the opinion of the Missouri Supreme Court in that case:

"We are satisfied that the Missouri statute, Section 5856, Revised Statutes 1889, govern in this case, and this brings us to the consideration of the point on which the defendant seems chiefly to rely, and on which the case turned in the mind of the learned trial judge, that is, as defendant contends, that in estimating the net value of the policy for extended temporary insurance, Section 5856 authorizes the insurance company to deduct not only the amount of loans made to the assured for payment or part payment of premiums to keep the policy alive, but also cash loaned him to be otherwise used as he might see fit. The argument is made for defendant that unless the company be allowed to so deduct the amount it would have no se-

curity for the loan. The defendant has the policy transferred to it as collateral security for the loan, and in this instance at least, the policy is ample security because the defendant will be allowed to deduct the whole amount of the debt due the plaintiff on the policy. Of course, if the assured should live beyond the period of temporary insurance, the policy would become extinct and the defendant would have only the personal liability of the estate of the assured to depend on. But, as the assured might die within the extended period of the policy, we can not say that there was no security at all. Such policies doubtless have some commercial value available in the market as collateral securities, varying, of course, according to the circumstances of the case. But we have nothing to do with that. Such considerations can have no influence in construing this statute. If the defendant advanced the \$485.14 to the assured believing that it would have the right to deduct it from the net value of the policy in case of non-payment of premium, before applying it to the payment of extended temporary insurance, whether because it so interpreted our statute or because it considered that the terms of the policy as amended superseded the provisions of the statute, it did so under a mistaken view of the law. Our law deems the subject of life insurance one that requires a special protection, and in this particular, it has provided that the policy-holder shall have the benefit of the extended temporary insurance specified in Section 5856, 'anything in the policy to the contrary notwithstanding.' Therefore, though a policy should expressly declare that it was agreed between the insurer and the insured that the provisions of the statute relating to extended temporary insurance or commutation should not apply, still they would apply. And if the parties could not in the beginning place themselves outside the policy of the law, they could not by an amendment to the contract do so. There is a great deal of technical learning in the subject of life insurance and our lawmakers have proceeded upon the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of that subject to the experienced officers of the insurance company, and for that reason have written into such contracts some provisions which the parties to them can not avoid. We hold, therefore, that the provisions of our statutes could no more have been avoided by the amendment to the policy in 1896, than by the original policy. And we hold, also, that the statute declaring that in ascertaining the net value of the policy it 'shall be computed upon the American experience table of mortality with four and a half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebted-

ness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy,' does not mean that indebtedness incurred by the insured for money borrowed from the company may also be deducted. The statute means only what it says, that indebtedness on account of past premium payments shall be deducted."

Undoubtedly wherever courts of equity may adjudge the invalidity of contracts of parties occupying dependent and fiduciary relations, the Legislature as possessing the power of *parens patriae* may enact such invalidity in advance.

The decision of the Missouri Supreme Court, and which was affirmed by the United States Supreme Court, in the case of *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 178 U. S. 389, is another explicit decision that the legislation of Missouri upon which the rights of insured in that case and the rights of the insured in these cases were upheld, is constitutional. This sort of legislation free from the power of the parties to change by contract, has also been upheld in other states.

Mutual Life Ins. Co. v. Teyman, 92 S. W. 335.

That was a decision by the Kentucky Court of Appeals in March, 1906.

In the opinion in that case the court, at p. 337 said:

"In *N. Y. Life Ins. Co. v. Curry & Bro.*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297, the authorities on the subject were reviewed by this court. The facts of that case were that one George Anderson, who was the owner of a paid-up life policy of insurance upon his life for \$630, in the N. Y. Life Ins. Company, payable to his estate borrowed of that company \$130, and assigned his policy as collateral security for its payment, upon the condition that in case of default in any payment of interest on the loan, the company might declare the debt due, cancel the policy and apply its cash surrender value to the payment of the insured's note and interest. In discussing this provision of the contract between the parties, this court in the opinion by Judge O'Rear said: 'That is pure and simple a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to or consent of the borrower of his collateral, if he promptly fails to pay in-

terest on the debt. The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid (\$630) at his death. The \$130 was borrowed from appellant since that completion of the contract. The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement upheld. This is said to be because on the prompt payment of the premium depends the mutuality of the contract and the ability of the insurance company to meet its obligations. But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are merely penalties for the non-payment of borrowed money, they are not allowed. They lead to, and themselves are unconscionable oppressions of the unfortunate.' After quoting with approval the case of *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush, 310; *Montgomery v. Phoenix Ins. Co.*, 14 Bush, 51; *Northwestern Ins. Co. v. Fort's Admr.*, 82 Ky. 269; *Mut. Life Ins. Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343; *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 60 S. W. 383, 53 L. R. A. 378, 95 Am. St. Rep. 393, and holding that they are in line with the case *supra*, the opinion concludes as follows: "*In the case at bar there is no conceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of money had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policy holders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business or charter rights, so far as we are advised, which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies and other corporations or individuals. We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the non-payment of the interest upon the loan is void.*"

When the loan agreements were made the parties thereto did not thereby sustain the relation of insurer and insured, but such contracts and such relation were that of borrower and lender of money, the same as if the insurance company had been a bank and the insured had been a borrower. It goes without saying that a banker loaning money to an insured on a policy could not by

the terms of the loan agreement incorporate into the terms of the policy, provisions different from the policy, or contrary to the law. If the banker could not do it, then the insurance company could not do it. This was expressly decided in the Smith case in the 173rd Mo. l. c. 342, in the following language:

"This statute does not undertake to regulate all business transactions that may occur between the life insurance company and a policyholder; it only puts its hands into the contract of life insurance; it deals only with the subject of insurance and premium, and if the parties choose to assume toward each the relation of borrower and lender of money other than to pay the premium, this statute has no concern with that relation. * * *

"The borrowing of money for a purpose other than the payment of a premium and the assignment of the policy as collateral security for the loan, put the parties, as to that item, in a new relation to each other. By virtue of the policy, and the premium, the parties stood in the relation of insurer and insured, and the law of insurance governed them in that relation, *but when the insured borrowed money of the insurer and assigned the policy as collateral security, the law governing their rights in that respect is the same as if he had borrowed money from a bank and given it the same collateral. In such case, the bank would have been entitled to a lien on the proceeds of the policy BUT NOT TO APPROPRIATE TO ITSELF THE PREMIUM WHICH WAS TO KEEP THE POLICY ALIVE.*"

X.

Defendant may rely on Section 5859 of the Missouri Revised Statutes of 1889. This claim was not presented to or considered by the Missouri Supreme Court as by its opinion will appear (Record Mary E. Head, pages 141-144). It was not claimed there that the endorsement of a paid-up policy for \$89.00 on her policy brought the case under that section. The statute reads as follows (Vol. 2 Rev. Stat. of Mo. 1889, page 1386):

"Sec. 5859. THE FOREGOING PROVISIONS NOT APPLICABLE, WHEN. The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in Section 5857, or if the legal holder of the policy

shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable" (R. S. 1879, Sec. 5986).

It may be claimed that her original policy No. 599690 was in the language of the foregoing section "Surrendered to the company for a consideration adequate in" her judgment as "the legal holder thereof."

This section received a legislative construction in 1895 (Mo. Session Laws 1895, pages 197-198), by the addition thereto of the following proviso, viz: *Provided, that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual payments thereon, but in all instances where three annual payments shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article.* This proviso having a legislative construction of said section of the act of 1889, must be read as a part of that act as originally framed from the time of its enactment. In Vol. 1 Fed. Stat. Case, p. 46, it is said:

"SUBSEQUENT STATUTES IN *Pari Materia*. In one of the early cases Chief Justice Marshall said that 'if in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject accords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.' The doctrine was reaffirmed by Mr. Justice Wayne, speaking for the Supreme Court: 'If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.'"

The following is the same statute as said section 5859 with the proviso of 1895 (Vol. 2 Rev. Statutes Mo. 1899, pages 843-4):

Sec. 7900. FOREGOING PROVISIONS INAPPLICABLE, WHEN. The three preceding sections shall not be

applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional surrender value, at least equal to the net single premium, for the temporary insurance provided for hereinbefore, or for the unconditional commutation of the policy for non-forfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then and in any of the foregoing cases this article shall not be applicable: *PROVIDED, that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual payments thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up or extended insurance, the net value of which shall be equal to that provided for in this article"* (R. S. 1889, Sec. 5859, Amended Laws 1895, p. 197 amended).

In this connection it should be remembered that Mr. Head had only paid two premiums on this policy when the legislative interpretation in the form of that proviso was made in 1895; that nine of his eleven premium payments were made thereafter, and that the loan of \$2270 was made nine years after that proviso. The testimony of the insurance expert, J. B. Reynolds (Record Mary E. Head case, pp. 31, 42, 101, 35, 43, 44, 102) that the amount of paid-up insurance due on this policy was \$2873.08, and that deducting the reversionary value of the loan for premiums the paid-up policy should have issued for \$1567.51, should also be borne in mind.

Moreover, it should be remembered that this is not an ordinary life policy with premiums payable during the life of the insured, but is a life policy whose payments are limited to twenty years and that therefore the amount of paid up policy is governed by that clause of the paid up policy statute of Missouri (Sec. 5857), which provides:

"and in case of a limited payment life policy or of a contained payment endowment policy payable at a certain time or at death, *it shall be for an amount* bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid."

and that there^{fore} a paid up policy should have issued in this Mary E. Head case for eleven-twentieths of \$10,000 or \$5500,

(since eleven of the twenty premiums had been paid before default), less the reversionary value of that part of the loan which covered premiums on the policy. The expert Reynolds testifies that that reversionary value was about \$1300, and deducting that from \$5500 we have \$4200 as the net amount of the paid up policy in this case under the statute.

The Missouri Supreme Court decided that the amount for which a paid up policy should have issued could not be paid or satisfied by a paid up policy for \$89, and this would be true if the application for and issue of a paid up policy had taken place under said agreement clause of section 5859, and not under Section 5857 providing for a paid up policy. Even under section 5859 the parties could not agree for a paid up policy less than the amount provided for by section 5857. The legislative construction made by the proviso makes that clear. It was not designed by the agreement clause of section 5859 to abrogate the common law rule that liquidated money demands can not be paid by less than their amount. It was not designed that a fixed vested demand for a paid up policy of \$4200 could be extinguished by a paid up policy for \$89. But what was done in this case must be ascribed to section 5857 and not to section 5859. It was not the case of a surrender of policy to the company "for a consideration adequate in the judgment of the legal holder" under said section 5859 but was a demand for and an attempted issue of a paid up policy. The application was made after default and therefore after the amount for which the paid up policy should issue, had become fixed by said section 5857. The application reads as follows: (Record Mary E. Head case p. 126)

"May 3, 1905.

"The New York Life Insurance Co. is hereby requested to endorse policy No. 599,690 for \$599,690, this being the amount of paid up insurance payable in accordance with the terms of the policy."

Richard G. Head,

Insured.

Mary E. Head,

Beneficiary Assignee.

Wm. G. Haydon, Witness.

This paper was the initiation of all that followed. It was a mere demand for paid up insurance and it did not open up or lead to any adjustment, contract, settlement or agreement of any kind.

It simply and solely called for and demanded a paid up policy as the applicant was entitled to by virtue of the laws of Missouri, which were a part of the policy, referred to in the application. On the day of the date of that demand defendant's cashier telegraphed to Mr. Head as follows: (Record Mary E. Head case p. 125)

"I also have your wire advising me that you have signed the application for paid up policy which trust will come in due course.

Yours very truly,

Geo. R. Tyner,
Cashier."

On May 4, 1905, Tyner, Cashier, wrote to Mr. Head as follows (Record Mary E. Head case, p. 125):

"May 4, 1905.

Mr. Richard G. Head, Las Vegas, N. M.:

Dear Sir:

I beg to acknowledge receipt of your draft for \$57.00 completing the cash payment of your policy No. 599,691 for which I enclose receipt. I also have your request for paid up policy No. 599,690, which goes to the Home Office today for attention.

Yours very truly,

Geo. R. Tyner,
Cashier."

On the same day Mr. Tyner transmitted the application for paid up insurance to the Home Office in New York saying in his letter of transmission (Record Mary E. Head, case p. 126):

"Kindly endorse the policy for whatever amount of paid up insurance is available and notify me in regard to the same. I am returning renewed receipt this date."

This shows that when the demand was made and afterwards forwarded to the Home Office it was not known what the amount of the paid up policy should be. It is true that in the blank space in the application for the paid up policy where the amount was to be inserted the number of the policy was by mistake written but when or where are not known. Of course those figures were not taken by any one as indicating the amount. What was done by defendant in New York is shown by the testimony of Arthur R. Grow the actuary of defendant at page 95 to 98 of the record in

the Mary E. Head case. That testimony shows that Mr. Grow, acting under the New York law and wholly ignoring the Missouri law figured out that after deducting from the paid up insurance the whole amount of the loan, there was a balance of \$89 which was endorsed on the policy (Record Mary E. Head case p. 25). This result having been thus obtained the policy with the endorsement was sent to Cashier Tryner who wrote to Mr. Head as follows (Record Mary E. Head case, p. 128):

"June 12, 1905.

Richard G. Head,
Las Vegas, N. M.

Dear Sir:

I beg to enclose herewith policy No. 599,690 duly endorsed for the amount of paid up insurance available on same after cancelling the indebtedness against the policy.

Yours very truly,

George R. Tryner,
Cashier.

On these facts we submit that there was not as contemplated by said section 5859, a surrender of the policy to the company; no consideration was agreed upon or paid by the company; and it was not within the contemplation of either party that they were making a contract or agreement for or to do anything or for any purpose.

The paid up policy section, 5857 has this language:

"and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of a policy may *demand of the company, and the company shall issue its paid up policy*"

for the amount provided for in that section. This language is a demonstration that the parties in this case were not acting under the agreement clause of section 5859. The transaction was a "demand" for a paid up policy by plaintiff followed by a refusal of the company to issue the paid up policy provided for by section 5857 which refusal left the extended insurance section 5856, the section controlling the case.

In *Burridge v. N. Y. Life Ins. Co.*, 211 Mo. 158-178-179 the Missouri Supreme Court in construing said section 5859 said:

"That section plainly contemplates that the relation of insurer and insured may be brought to an end if the insurer complies with its provisions and the policy is surrendered for a consideration adequate in the judgment of the holder."

In this case of Mary E. Head the relation of insurer and insured was not brought to an end by the endorsement of the \$89 on the old policy. On the contrary the re-delivery of the old policy with that endorsement was intended as a paid up policy in continuation of the old one, and the relation of insurer and insured was not canceled. The above Burrridge case is precisely in point on this branch of the case as it is also on other points. In the case of *Paschedag v. Life Ins. Co.*, 155 Mo. App. 185, 199, 200, which was a case similar to this Mary E. Head case the St. Louis Court of Appeals in its opinion said:

"It is next argued that, by the loan contract and the surrender of the policies to the defendant at the time the loan was made, it appears the insured accepted the proceeds of the loan as an adequate equivalent in his judgment for his rights in the premises and therefore as he was the sole beneficiary (the policy having been payable to his personal representatives) its subject-matter is relieved from the operation of the non-forfeiture provisions of the statutes by virtue of section 7900, which provides, among other things, that the three preceding sections as to non-forfeiture, etc., shall be inapplicable if the policy shall be surrendered to the company 'for a consideration adequate in the judgment of a legal holder thereof.' But, of course, this involves, too, a transaction where the parties contemplate a cessation of the insurance contract at the time. By the express provision of the statute, the insured may surrender the policy and terminate the relation of insurer and insured for any consideration which in his judgment is adequate therefor, but the consideration must be given by the company for such a surrender and not for some other purpose. The provision of the statute referred to is without influence here for the reason the matter of surrendering the policy in the sense of the statute for an adequate consideration was not in contemplation of the parties. Indeed, it is clear the parties did not intend to terminate the relation of insurer and insured by this transaction, for insured reserved the right to pay the loan and redeem the pledge of the policies, and defendant proceeded to notify him when the subsequent payment fell due as though the insurance were still in force and not then surrendered for such a consideration as was deemed adequate in the judgment of the insured. See, in this connection, *Burrridge v. Ins. Co.*, 211 Mo. 158, 109 S. W. 560.

Where the transaction is denominated by the parties as a loan and the pledge of the policies and their dealings touching the matter manifest they did not intend the policy was thereby surrendered in the sense of the statute referred to for a consideration adequate in the judgment of the insured, the court is not justified in saying the transaction was a surrender. For a case directly in point see *Raymond v. Ins. Co.*, 86 Mo. App. 391."

In said case of *Raymond v. Ins. Co.*, 86 Mo. App. 391-396, the St. Louis Court of Appeals in its opinion said:

"The court was also right in refusing to declare there was any evidence that the policy in suit was surrendered or sold to the company for a full consideration to the holder. The terms of the contract and note utterly disprove this notion. They show conclusively that the transaction evidenced by them was merely a loan, and that the policy was delivered as collateral security upon an express agreement that the surplus of the collateral security, or in the words of the contract, 'the balance of the surrender value beyond the amount of the loan,' on non-payment of the note, should be paid over to plaintiff and her husband. *This language completely negatives the idea that there was any present sale or surrender in toto of the policy at the time the loan was effected.*"

This case was decided in 1900 which was four years before these transactions.

If it be said that plaintiff Mary E. Head was called upon to protest against the amount of paid up insurance on the receipt of the old policy back with the indorsement, it suffices to say that neither she or her father knew the amount, and the company did not call for or expect a protest or objection from either of them. There was nothing in the transaction which involved the idea of a negotiation, and after the making of the demand for paid up insurance, the Heads were not expected to say or do anything. It was the duty of the company on its own peril to issue the policy for paid up insurance for the correct amount, otherwise the paid up policy was void.

On these points we call attention to the decision of the Springfield Mo. Court of Appeals in *Gillen v. New York Life Ins. Co.*, 161 S. W. Rep. 667-672 where the court in its opinion says:

"It must be granted, however, that the defendant had no right to impose on the insured any such settlement, and it will

be seen that when it wrote to him in effect that it had foreclosed the loan and applied the net value of the policy to the payment of the loan, thus canceling both the policy and his personal indebtedness to it, *the letter in no wise suggested that he had any right to object and decline any such settlement. This letter was not designed to give the insured any freedom to contract with reference to this matter. It gave no figures or amounts and no information as to the method of computation used or how it arrived at the result that the policy is of no value. It is based on the assumption by the defendant that the loan agreement and pledge of the policy gave the defendant company the absolute right to apply the net value of the policy in payment of the loan and that it had exercised this right and therefore the 'policy has no further value.'* The letter does not call for any choice or answer, and the only thing suggested that the insured could do is to have protested against the arbitrary action of the company. The contention of the defendant is that the failure of the insured to so protest works an estoppel by acquiescence equivalent to a voluntary agreement that the policy be surrendered in consideration of the cancellation of the loan indebtedness. It must, however, be borne in mind that the insured was, under no obligation to make any choice or request in order to obtain the extended insurance. The law gave him this benefit unless he voluntarily chose and assented to the other alternative of at that time surrendering the policy for a consideration adequate in his judgment.

"In thus charging against the insured against a duty to protest against the company's action in this respect, defendant imputes to him and the beneficiary a better knowledge of their rights under the policy than was possessed by the company. We will accord to the company an honesty of purpose and that it honestly believed the loan agreement and pledge of the policy gave it a right to thus cancel the policy, although, as we have seen, it was mistaken in this. As said in *Smith v. Insurance Co.*, *supra*, the insured is not presumed to have the technical knowledge in reference to life insurance contracts possessed by the experienced officers of such companies; and, if they did not know the rights of the respective parties under this policy contract, how can the assured be charged with sufficient knowledge of his rights thereunder on which to base a protest? Logic and common sense demand that before there is a duty to protest against any action of another the party protesting must have sufficient knowledge of his rights to justify such protest and which suggests to him his duty to make protest."

This case is similar to this *Mary E. Head* case and is precisely in point. On the point of estoppel the court in its opinion in that case further said:

"Nor where there any sufficient facts pleaded to constitute an estoppel. A plea of estoppel to be sufficient must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby—that he was induced to do or refrain from doing something to his injury. Whatever may be the facts, the defendant did not plead that it refrained from collecting the personal obligation arising from the loan agreement because of its reliance on such debt being fully paid by the application of the net value of the policy to such purpose. *Miller v. Anderson*, 19 Mo. App. 71, and cases cited. *Osborn v. Court of Honor*, 152 Mo. App. 652, 133 S. W. 87. *Northrup v. Coulter*, 150 Mo. App. 639, 649, 131 S. W. 364."

There is no plea of estoppel in this case such as is suggested above or otherwise (Record Mary E. Head case, pp. 10-13). The answer of defendant explicitly pleads the transactions on this branch of this case as being paid up insurance and does not anywhere hint at the idea that there was a contract or agreement for the surrender of the policy for "a consideration adequate in the judgment of the legal holder."

On this point of estoppel we also call attention to paragraph 5 of the opinion in this case of the Missouri Supreme Court (Record Mary E. Head case, page 148).

See also the testimony on this point of plaintiff Mary E. Head copied in full in our foregoing statement of facts preceding herein in this brief and argument (Record Mary E. Head case, p. 58).

Acts which cannot be agreed to because contrary to law, cannot be indirectly worked out or validated by waiver or estoppel and neither waiver or estoppel exists where there is an absence of knowledge, and especially where fiduciary relations exist.

The decision of the court in the case of *Christensen v. N. Y. Life Ins. Co.*, 160 Mo. App. 486 arose under the revised statute of 1899 and not under that of 1889. The policy in that case was issued December 21, 1901, *id.* p. 490. The court in its opinion in that case did not notice or consider the construing proviso annexed to the statute in 1895. Besides in that case as appears from the opinion (page 492):

"No demand was made by the insured for a paid up policy by written request or otherwise after the date of default at any time."

This fact materially differentiates that case from this. The opinion in that case is in defiance of all the Missouri insurance statutes and court decisions which we have cited. It holds that an estoppel may be based on an unlawful act.

There is a material difference between Sec. 5859 of R. S. 1889, which applies to this case, and Sec. 7900 R. S. 1899. The statute of 1889, Sec. 5859, has the word "cash" after the word "unconditional" and before the word "surrender", in the third and fourth lines, and in the sixth and seventh lines, it has the further following words: "For which the net value shall be equal to that provided for in Sec. 5857." The above words which are in Sec. 5859 R. S. 1889 are not contained in the corresponding section No. 7900 R. S. 1899. Said words "cash" and "for which the net value shall be equal to that provided for in Sec. 5857" contained in the statute of 1889, mean that the new policy which may be issued under said Sec. 5859 must be for the unconditional cash surrender value, and it must be for non-forfeitable paid-up insurance "for which the net value shall be equal to that provided for in Sec. 5857."

The testimony of the expert Reynolds shows that on May 3, 1905, when the paid-up insurance was demanded, the net value of the policy in this suit would purchase new insurance for \$2873.08. Said sum of \$2873.08 or \$4200 is the amount for which Mary E. Head was entitled to insurance under either Sec. 5857 or Sec. 5859 R. S., 1889. But there was no attempt or pretense on the part of the Insurance Company that the company was complying with either Sec. 5857 or Sec. 5859 of the Missouri Statutes of 1889, by its endorsement on Miss Head's policy.

The request was made on a blank of the company which referred to the amount of "paid-up insurance payable in accordance with the terms of the policy." In all that the company did, both in the preparation of the form for the application and in the endorsement of \$89 on the policy, the laws of New York and not the laws of Missouri were sought to be complied with.

Said Sec. 5859 does not apply to this case because the policy sued on does not, as said Sec. 5859 expressly provides:

"contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in Sec. 5857."

Said Sec. 5859 further provides as follows:

"Or if the legal holder of the policy shall within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then and in any of the foregoing cases this act shall not be applicable."

In this case, Miss Head did not surrender the policy and accept from the company another form of policy.

As we have seen the company did not comply with the paid up policy Missouri statute, because of insufficiency of the amount endorsed on the policy. It follows that as there was no compliance in this case by the Insurance company, either with the provisions of Secs. 5857 or 5859 in the revision of 1889, or with the provisions of Secs. 7898 and 7900 of the revision of 1899, plaintiff is entitled to recover for the amount of the policy, less the indebtedness for which it received credit in the judgment below in accordance with the non-forfeitable provisions of Sec. 5856 R. S. 1889.

XI.

It should be remembered that the preceding point does not apply to the Richard G. Head, Jr., case No. 255.

XII.

The suggestion that the proceedings of the New Mexico Probate Court show that as to the Richard G. Head Jr., case No. 255, the loan agreement was a New Mexico contract, is unfounded. The question is where the original policy and loan contract were made. The company agreed in the policy to make the loan of \$2270 if borrowed within eleven and fifteen years of the 20 years during which the premiums were to be paid. The loan was made according to the agreement therefor in the policy for \$2270 in the eleventh year. There was no necessity for the new additional policy loan contract required by the company at the time of the loan, for the company by reason of the loan agreement in the policy was bound to make the loan without a new agreement. The agreement in the policy for the loan, provided that the loan should run with interest at 5 per cent; that the policy should be assigned as security for the loan and that the Heads as borrowers "may

elect" when the loan should be payable. The agreement in the policy for the loan was perfect and needed nothing to complete it. There was nothing in the loan agreement in the policy which made either the policy or loan subject to New York laws, and the requirement of the company, by such a provision in the additional so called loan contract made in 1894 was as wrongful and illegal as it would have been if made in the policy. The Heads as borrowers had the right to the loan without any such stipulation, by virtue of the loan agreement in the policy. The proceedings of the New Mexico Probate Court in the Richard G. Head, Jr., case No. 255, were had for the purpose simply of empowering his father as his guardian to receive the money due on the loan contracted for in the policy. And since the loan agreement was in the policy, it follows that the loan agreement was a Missouri contract with the policy of which it was a part.

XIII.

We submit that we have fully answered defendant's contentions in the foregoing. Throughout defendant's brief it speaks of defendant company as a non-resident of Missouri. As we have seen it is not material whether it was a citizen or resident of that state, but although it was incorporated in New York, by coming into Missouri and obtaining a license to do business therein, it acquired a domicile and residence there the same as if incorporated therein, and by so doing it agreed to be bound as to all policies issued through its Kansas City, Mo. branch and to be governed by the laws of Missouri which issued the license defendant applied for. It asks the court now to help it break that contract with Missouri. It has done business in Missouri for 20 years and more under its license to do business in that state under its laws, and when Mr. Head contracted with it, in Missouri he was not doing business with defendant as a party "temporarily" within Missouri as counsel suggest at page 16 of their brief. The loan agreement was not a new agreement. The loan agreement in the policy was carried out by the Heads making their loan notes, and the pledges of their policies to the company and the simple payment by it to them of the loan money. The only agreement or contract whose obligation is sought to be impaired in these cases is defendant's contract with the state of Missouri made by defendant as a condition, and as the consideration, for its license, to comply with

its laws, in the transaction of its business at its branch agency in that state. The only stipulation in the new so called loan agreement, not in the loan agreement in the policy, was the one inserted by the company that the laws of New York should govern, but this would have been illegal in the policy, and as that was a Missouri contract, defendant had no right to impose that unlawful condition in carrying out and executing the loan contract which was a complete contract as made in the policy. The breach of the loan contract as contained in the policy would have been actionable in favor of the Heads, if the company had refused to make the loans as provided for therein. The rights of the Heads to the loans made were derived from and under the loan contracts in the policies which were Missouri contracts. The new so called loan agreement was wholly unnecessary and did not change the rights of the parties.

XIV.

The motion to dismiss the writ of error in each case for want of jurisdiction should be sustained, or the judgment in each case should be affirmed.

Respectfully submitted,

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE, &
GOODWIN CREASON,
Attorneys of Defendant in Error.



NEW YORK LIFE INSURANCE COMPANY *v.*
HEAD.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 255. Argued March 10, 1914.—Decided June 8, 1914.

Decided on authority of the preceding case.
241 Missouri, 420, reversed.

THE facts are stated in the opinion.

Mr. James H. McIntosh, with whom *Mr. Gardiner Lathrop*, *Mr. Cyrus Crane*, *Mr. O. W. Pratt* and *Mr. S. W. Moore* were on the brief, for plaintiff in error.

Mr. Buckner F. Deatherage, with whom *Mr. Goodwin Creason*, *Mr. James S. Botsford*, *Mr. W. P. Borland* and *Mr. James A. Reed* were on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is governed by the opinion in No. 254 just decided. The policy sued on was one of the two issued to Richard G. Head in Kansas City, Missouri, in favor of his minor son. It was delivered at Kansas City and the first premium paid there, as in the previous case, and the subsequent premiums were paid in New Mexico. There was borrowed upon the policy by authority of the proper probate court in New Mexico the sum of \$2,270.00 under a loan agreement and pledge; there was a default and an adjustment of the policy as in the other case. The case was tried in the court of first instance with the other case, was embraced in the Supreme Court of Missouri by the

FLORIDA EAST COAST LINE v. UNITED STATES. 167

234 U. S.

Counsel for Appellant.

same opinion by which the other case was disposed of, and there thus being no distinction between the two cases, for reasons given in the other case, No. 254,

The judgment is reversed.

FLORIDA EAST COAST RAILWAY COMPANY ..